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No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

UKIAH ADVENTIST HOSPITAL, a California not-for-profit corporation, now known as UKIAH VALLEY MEDICAL CENTER, and ADVENTIST HEALTH SYSTEM/WEST, a California not-for-profit corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS CAMPBELL
(Counsel of Record)
DEBORAH H. BORNSTEIN
JAMES W. TEEVANS
DANIEL D. MCDEVITT

GARDNER, CARTON & DOUGLAS
321 North Clark Street
Chicago, IL 60610-4795
(312) 644-3000

Attorneys for Petitioners

Of Counsel:
DIANE P. WOOD
1111 East 60th Street
Chicago, IL 60637

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QUESTIONS PRESENTED

1. Does the statutory grant of exclusive jurisdiction to the courts of appeals to review Federal Trade Commission cease and desist orders oust the district courts of their federal question jurisdiction to scrutinize and restrain *ultra vires* actions by administrative agencies, as the court of appeals held in this case?

2. Does the Federal Trade Commission have authority to proceed under Section 7 of the Clayton Act against an assets acquisition by a not-for-profit hospital?

3. Can the court of appeals refuse to consider an appeal from an order denying a motion for a preliminary injunction?

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No.

IN THE
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UKIAH ADVENTIST HOSPITAL, a California not-for-profit corporation, now known as UKIAH VALLEY MEDICAL CENTER, and ADVENTIST HEALTH SYSTEM/WEST, a California not-for-profit corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ukiah Adventist Hospital, now known as Ukiah Valley Medical Center, and Adventist Health System/West (collectively "Ukiah"),[1] seek a writ of certiorari to review an opinion and order of the United States Court of Appeals for the District of Columbia Circuit dismissing in part Ukiah's appeal and transferring the original preliminary injunction action to the United States Court of Appeals for the Ninth Circuit.

[1] Pursuant to Rule 29.1, Adventist Health System/West is the parent company of Ukiah Adventist Hospital, now known as Ukiah Valley Medical Center, and Adventist Health System/Loma Linda. There are no other parent companies or non-wholly owned subsidiaries of any of the petitioners. All of the parties in the courts below and in this Court are named in the caption.

OPINIONS BELOW

The December 29, 1992 opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 981 F.2d 543, and is reprinted at Appendix A. The D.C. Circuit's March 23, 1993 order denying Ukiah's petition for rehearing is reprinted at Appendix B. The October 17, 1991 opinion of the United States District Court for the District of Columbia denying Ukiah's motion for a preliminary injunction and transferring the case to the United States Court of Appeals for the Ninth Circuit is reported at 1991-2 Trade Cas. (CCH) ¶ 69,620, and is reprinted at Appendix C.

The February 8, 1989 order of Administrative Law Judge Lewis F. Parker dismissing in part the administrative complaint on the ground that the Federal Trade Commission ("FTC") has no jurisdiction over a pure assets acquisition by a not-for-profit entity is reprinted at Appendix D. Judge Parker's Initial Decision of August 2, 1990, dismissing the administrative complaint for lack of jurisdiction, is reprinted at Appendix E. The August 2, 1991 order and opinion of the Federal Trade Commission reversing Judge Parker's Initial Decision is reprinted at Appendix F.

The January 30, 1990 order of the United States District Court for the Northern District of California denying Ukiah's motion for preliminary injunction is reported at 1990-1 Trade Cas. (CCH) ¶ 68,916, and is reprinted at Appendix G. The August 13, 1990 opinion of the Ninth Circuit Court of Appeals affirming the district court's order is reported at 911 F.2d 261, and is reprinted at Appendix H.

Judge Parker's December 9, 1992 decision in favor of Ukiah after full trial on the merits is reprinted at Appendix I. The Commission's April 16, 1993 order denying Ukiah's request for a stay of further FTC proceedings pending Ukiah's possible filing of a petition for a writ of certiorari to the D.C. Circuit is reprinted at Appendix J.

JURISDICTION

The court of appeals issued its opinion on December 29, 1992. (App. A.)[2] On March 23, 1993, the court of appeals entered an order denying Ukiah's timely petition for rehearing and suggestion for rehearing *en banc*. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).[3]

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1) (1988) provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

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[2] References to the opinions and orders reprinted in the Appendix appear throughout the petition as "App.", followed by the relevant appendix page designations.

[3] On April 7, 1993, the Clerk of the D.C. Circuit transmitted, in lieu of a mandate, a copy of the court's opinion and its judgment to the Clerk of the District Court. The Clerk of the District Court transferred the case to the Ninth Circuit Court of Appeals. The case was docketed in the Ninth Circuit on April 22, 1993, and on June 2, 1993, Ukiah filed a motion to stay the proceedings in the Ninth Circuit pending the outcome of this Petition for Writ of Certiorari. The motion to stay is now pending in the Ninth Circuit.

28 U.S.C. § 1331 (1988) states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1651(a) (1988) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44 (1988), states:

> "Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1988), provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of

> commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 11 of the Clayton Act, 15 U.S.C. § 21 (1988), provides in relevant part:

> (c) Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modifiction of findings; finality of judgment and decree
>
> Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission, board, or Secretary be set aside . . . .
>
> (d) Exclusive jurisdiction of Court of Appeals
>
> Upon the filing of the record with its [sic] the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission, board, or Secretary shall be exclusive.

STATEMENT OF THE CASE

This case arises from Ukiah's action in the United States District Court for the District of Columbia to enjoin the FTC from proceeding with its administrative challenge to the acquisition of assets by a small not-for-profit hospital in Ukiah, California. Ukiah seeks review by writ of certiorari of the D.C. Circuit's holding that the statutory grant of exclusive jurisdiction to the courts of appeals to review FTC cease and desist orders ousts the district courts of their federal question jurisdiction to scrutinize and restrain *ultra vires* agency actions. Based upon its own prior opinion in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984) ("*TRAC*"), the court of appeals reasoned that *all* challenges to an agency's jurisdiction prior to a cease and desist order lie within the exclusive jurisdiction of the courts of appeals, and therefore transferred Ukiah's action for injunctive relief to the Ninth Circuit. In reaching this result, the D.C. Circuit has extended the exclusive jurisdiction of the courts of appeals to review cease and desist orders well beyond the language of the statutory grant of Section 11 of the Clayton Act. In so doing, the court of appeals has rendered an opinion that significantly curtails the district courts' federal question jurisdiction, contrary to longstanding interpretations of 28 U.S.C. §§ 1331 and 1337 (1988), and contrary to this Court's prior decisions and the decisions of other circuits acknowledging the authority of the district courts to curb administrative excesses.

In August 1988, Ukiah Adventist Hospital, now known as Ukiah Valley Medical Center ("Ukiah Valley"), a California not-for-profit corporation, acquired substantially all of the assets of Ukiah Hospital Corporation, doing business as Ukiah General Hospital ("Ukiah General"), a California business corporation, in a non-stock transaction. (App. a-3; e-6.)

Prior to the acquisition, there were three small acute-care hospitals in Ukiah, California, a rural community of approximately 13,600 people located 100 miles north of San Francisco. (App. i-

5-6.) Ukiah Valley had 43 beds; Ukiah General had 51 beds; and Mendocino Community Hospital had 56 beds. (App. i-5.) Together, Ukiah Valley and Ukiah General had a total capacity of 94 beds, and each hospital had an average occupancy of only 26 patients per day. *Id.* The total census for all three hospitals combined averaged about 60 patients per day during 1988. *Id.*

The FTC initially asserted regulatory jurisdiction over the transaction by commencing an investigation in August 1988, shortly after Ukiah had concluded the transaction.[4] (App. g-2.) The FTC issued an administrative complaint on November 7, 1989, charging Ukiah with violating Section 7 of the Clayton Act, 15 U.S.C. § 18. (App. e-1; g-2.) On January 19, 1990, Ukiah filed its motion to dismiss the administrative complaint, based in part upon the FTC's lack of jurisdiction over an assets acquisition by a not-for-profit entity. Ukiah pointed out that the assets acquisition clause of Section 7, 15 U.S.C. § 18, requires that the acquiring person be "subject to the jurisdiction of the Federal Trade Commission," and that not-for-profits are not subject to the jurisdiction of the FTC. 15 U.S.C. § 44. (App. d-1-2; e-1-2.)

On February 8, 1990, Administrative Law Judge Lewis F. Parker granted, in part, Ukiah's motion to dismiss. (App. D.) Judge Parker concluded that pure assets acquisitions by entities not subject to the jurisdiction of the FTC, such as not-for-profits, were excluded from the reach of Section 7. (App. d-8.) On August 2, 1990, Judge Parker issued his Initial Decision dismissing the administrative complaint in its entirety. (App. E.) Judge Parker reaffirmed his February order, holding that the FTC does not have Clayton Act jurisdiction over assets acquisitions by not-for-profit entities, and that the Ukiah transaction was outside the scope of the FTC's jurisdiction. (App. e-8-9.)

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[4] Ukiah was not required to file a pre-merger notification under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1988), because the $6 million purchase price was well below the monetary threshold for such filings.

One year later, on August 2, 1991, the full Commission reversed Judge Parker. (App. F.) The Commission decided that it had jurisdiction over assets acquisitions by not-for-profits, including the Ukiah transaction. (App. f-41.)

With this final FTC action on the question of the agency's own jurisdiction, after three years of proceedings before the FTC, on September 12, 1991, Ukiah brought a separate action in the District Court for the District of Columbia seeking injunctive and declaratory relief. (App. c-1.)[5] Ukiah alleged jurisdiction in the District Court based upon 28 U.S.C. §§ 1331, 1337 and 1651. Ukiah sought to obtain a prompt judicial ruling on the threshold issue of the FTC's jurisdiction over the Ukiah transaction and to stop the FTC's dubious action, which continued to cause irrepara-

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[5] Ukiah twice previously had tried to obtain judicial resolution of the issue of the FTC's jurisdiction at the pretrial stage, but was unsuccessful due to the lack of final agency action on the question of its own jurisdiction. On February 24, 1989, Ukiah filed a motion to quash the FTC's initial subpoena *duces tecum*, issued on February 3, 1989, on the ground that the FTC lacked jurisdiction under Section 7 of the Clayton Act. (App. g-2.) The full Commission denied Ukiah's motion on April 10, 1989. *Id.* Based upon its earlier assertion that the FTC lacked jurisdiction, Ukiah refused to comply with the subpoena. Because the FTC did not attempt to enforce the subpoena in federal court, Ukiah was unable to obtain judicial determination of the question of the FTC's jurisdiction at that time. On December 19, 1989, Ukiah filed an action in the District Court for the Northern District of California seeking a declaration that the FTC has no jurisdiction over the acquisition and an injunction against the FTC's proceeding. (App. G.) On December 20, 1989, the district court denied Ukiah's application for emergency relief, and on January 30, 1990, the court denied Ukiah's motion for a preliminary injunction and dismissed the action. *Id.* The court held that the issuance of the administrative complaint by the FTC was not final agency action and, therefore, the district court had no jurisdiction to review the FTC's action or to consider the issue of the FTC's jurisdiction. (App. g-4.) On August 13, 1990, the Ninth Circuit affirmed. (App. H.) The court of appeals also held that the absence of final agency action precluded judicial review. *Id.* Neither the court of appeals nor the district court reached the substantive question of the FTC's jurisdiction over the Ukiah transaction.

ble injury to this small rural hospital.[6] On October 17, 1991, the district court, stating that it was "sympathetic to plaintiffs' position," held that it lacked jurisdiction over the merits of the controversy based upon the D.C. Circuit's prior ruling in *TRAC*. (App. c-1.) The district court denied Ukiah's motion for a preliminary injunction and, pursuant to 28 U.S.C. § 1631, transferred the case to the Ninth Circuit Court of Appeals. (App. c-2.)

Ukiah appealed the district court's order to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1292(a)(1) and alternatively sought mandamus, pursuant to 28 U.S.C. § 1651, to require the district court to hear the preliminary injunction motion. On December 29, 1992, the court of appeals affirmed. (App. A.) The court of appeals held that the district court properly concluded that it had no jurisdiction to hear the suit. (App. a-10). Relying upon its prior opinion in *TRAC*, the court of appeals held that the Ninth Circuit Court of Appeals has exclusive jurisdiction to hear Ukiah's preliminary injunction action. (App. a-14.) Despite the district court's express denial of Ukiah's preliminary injunction motion (App. c-2), the court of appeals refused to hear Ukiah's appeal under 28 U.S.C. § 1292(a)(1). (App. a-7-8.) The court also held that the order transferring the case to the Ninth Circuit Court of Appeals was not appealable. (App. a-8.) Ukiah timely filed a motion for rehearing and suggestion for rehearing *en banc*, and on March 23, 1993, the court of appeals denied Ukiah's motion. (App. B.)

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[6] In support of its request for injunctive relief, Ukiah submitted the affidavit of ValGene Devitt, President of Ukiah Valley Medical Center. Mr. Devitt attested to the deleterious impact that the FTC's prosecution has had on Ukiah, including decreased staff salaries, deferral of necessary equipment purchases, loss of crucial philanthropic support and public funding, and impairment of Ukiah's ability to recruit qualified medical staff, all in addition to the enormous litigation costs imposed by the FTC's administrative action. The FTC offered no evidence to the contrary. Harm of this type has been recognized as sufficiently grievous to tip the balance in favor of injunctive relief. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

Now, after five years of proceedings before the FTC, no court has yet considered the issue of the agency's jurisdiction. The FTC action continues. The administrative action was tried on the merits in July 1992 before Judge Parker. On December 9, 1992, Judge Parker again dismissed the FTC's complaint. (App. I.) Judge Parker concluded that the FTC had failed in its proofs and that the challenged acquisition had not conferred market power on Ukiah and was not likely substantially to lessen competition in the relevant geographic market. (App. i-54.) The FTC appealed Judge Parker's decision, and on April 22, 1993, the full Commission heard oral argument on the appeal.[7]

REASONS FOR GRANTING THE WRIT

Summary of Argument

The opinion of the court of appeals strips the district courts of jurisdiction to enjoin actions by agencies in excess of their statutory powers. The opinion expands the courts of appeals' exclusive jurisdiction to review FTC cease and desist orders, thus barring other courts from entertaining any suit requesting relief that *might* affect the courts of appeals' prospective jurisdiction to review a later cease and desist order. (App. a-10-11.) The D.C. Circuit's opinion disregards the plain language of Section 11 of the Clayton Act granting exclusive jurisdiction to review cease and desist orders to the courts of appeals. The opinion precludes any district court scrutiny of *ultra vires* agency orders or actions pursuant to the district courts' usual federal question jurisdiction. The court of appeals thus assumes the implied repeal of long-acknowledged district court jurisdiction under 28 U.S.C. §§ 1331 and 1337, and directly conflicts with this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), as well as the decisions of other courts of appeals and the practice of district courts. The

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[7] On April 13, 1993, Ukiah filed a motion with the FTC requesting the agency to stay argument on the FTC's appeal from Judge Parker's ruling in favor of Ukiah. The FTC summarily denied the motion on April 16, 1993. (App. J.)

court of appeals' opinion disrupts the allocation of judicial power between the courts of appeals and the district courts, and effectively precludes all efforts to enjoin administrative actions in excess of delegated powers. This misallocation of judicial power is doubly significant because the D.C. Circuit is the preeminent forum for judicial review of agency action. The opinion is irreconcilable with the Second Circuit's interpretation of the scope of exclusive jurisdiction under Section 11 of the Clayton Act in *PepsiCo, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973), and with the principles of judicial restraint applied by this Court in interpreting statutory grants of jurisdiction. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

I.

A. The *TRAC* Doctrine Applied Below Conflicts With Opinions Of The Second Circuit And This Court.

By its plain terms, Section 11 of the Clayton Act, 15 U.S.C. § 21, vests the courts of appeals with exclusive jurisdiction to review cease and desist orders issued by the Commission. Relying upon its earlier opinion in *TRAC*, the court of appeals held that Section 11 strips the district courts of jurisdiction to hear "'any suit seeking relief that might affect the Circuit Court's future jurisdiction.'" (App. a-10.)

The D.C. Circuit's effort to bootstrap the specific jurisdiction of the courts of appeals into a global regime of exclusive appellate review is patently inconsistent with the Second Circuit Court of Appeals' opinion in *PepsiCo, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973).[8] It is also irreconcilable with this Court's opinions in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 491-94 (1991), *K Mart Corp. v.*

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[8] *PepsiCo* involved the question of exclusive appellate jurisdiction under Section 5 of the FTC Act, 15 U.S.C. § 45, which is identical in all relevant parts to Section 11 of the Clayton Act, 15 U.S.C. § 21.

Cartier, Inc., 485 U.S. 176, 190-91 (1988), and *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589-91 (1980), and with the principles established by this Court for interpreting legislative grants of jurisdiction. *See Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 580 (1982) (holding that judicial power depends upon the Constitution or enabling legislation, and jurisdictional statutes must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes"); *see also Rubin v. United States*, 449 U.S. 424, 430 (1981) (when terms of a statute are unambiguous, court's inquiry is complete).

Over 20 years ago, Judge Friendly held that the grant of exclusive jurisdiction to the courts of appeals is limited to review of cease and desist orders by the FTC:

> Although the Federal Trade Commission Act limits review by a court of appeals to "any person, partnership, or corporation required by an order of the Commission to cease and desist," we agree with appellants that the fact that the order here assailed is not one requiring PepsiCo to cease and desist from anything does not lead inexorably to the conclusion that it is not reviewable, but only that it is not reviewable by petition to a court of appeals.

PepsiCo, 472 F.2d at 185 (citations omitted); *see also E.I. DuPont de Nemours & Co. v. FTC*, 488 F. Supp. 747, 750 (D. Del. 1980).[9]

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[9] Unlike the posture of the administrative proceeding in *PepsiCo*, the FTC's decision reversing Judge Parker and holding that the FTC has jurisdiction under the Clayton Act over assets acquisitions by not-for-profit entities is final agency action on the issue of the agency's jurisdiction. The FTC's decision is "definitive" and it has a "direct and immediate . . . effect on the day-to-day business" of Ukiah. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151, 152 (1967). The ruling is an unambiguous pronouncement on a purely legal question. *See Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986); *Atlantic Richfield* (continued...)

In construing exclusive jurisdiction provisions, this Court has looked to the terms of the particular statute in question. For example, in *McNary*, this Court granted certiorari to determine whether Section 210(e) of the Immigration Act, 8 U.S.C. § 1160(e) (1988), precluded district court jurisdiction to hear a constitutional challenge to agency practice. 498 U.S. at 485-89. Section 210(e) provides that the denial of adjustment status by the Immigration and Naturalization Service ("INS") can be reviewed "only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. § 1160(e)(3)(A). This Court held that the district court properly had federal question jurisdiction to hear the constitutional challenge, and that the exclusive review provisions of Section 210(e) did not divest the district court of its general federal question jurisdiction. The touchstone for this Court was the language of the exclusive review provision: "[H]ad Congress intended the limited review provisions of § 210(e) of the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." 498 U.S. at 494. In *McNary*, the district court action did not seek "review on the merits of a denial of a particular application." *Id.* Therefore, this Court concluded that "the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired by § 210(e)." *Id.*; *see also Morris v. Helms*, 681 F.2d 1162, 1163-64 (9th Cir. 1982)

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[9](...continued)
Co. v. Department of Energy, 769 F.2d 771, 782 (D.C. Cir. 1984); *Athlone Indus. Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983). The FTC's ruling that Ukiah is not exempt from agency scrutiny under Section 7 has visited irreparable harm on two small rural hospitals that goes well beyond the normal incidents of litigation costs. *See United States v. Cabrini Med. Ctr.*, 639 F.2d 908, 910 (2d Cir. 1981). In its brief in the court of appeals, the FTC did not dispute that Ukiah has exhausted its administrative remedies. *See McKart v. United States*, 395 U.S. 185, 193 (1969); *Rafeedie v. INS*, 880 F.2d 506, 513-15 (D.C. Cir. 1989). The issue of the FTC's jurisdiction is ripe for review. *See Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813, 816 (D.C. Cir. 1990); *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 92-93 (D.C. Cir. 1986).

(construing exclusive appellate review provision of Federal Aviation Act in accordance with terms of statute).

In *K Mart*, one of the petitioners contended that the district court's federal question jurisdiction was usurped by 28 U.S.C. § 1581(a), which vests the Court of International Trade with exclusive jurisdiction over "any civil action commenced to contest the denial of a protest." The petitioner admitted that the suit was not a protest, but argued that since the suit included subject matter that may give rise to a protest, the Court of International Trade had exclusive jurisdiction "as a corollary to protest jurisdiction." *K Mart*, 485 U.S. at 190 (quoting Brief for Petitioner). This Court rejected the petitioner's attempt to expand the exclusive jurisdiction of the Court of International Trade, stating that Section 1581(i)(a) "will not bear petitioner's reading." *K Mart*, 485 U.S. at 190. Since the "suit involve[d] no 'protest,' much less a denial of one," the Court held that the district court had jurisdiction to hear the case. *Id.* at 190-91; *see also Harrison*, 446 U.S. at 589 (provision of Clean Air Act that courts of appeals have exclusive jurisdiction over "any other final agency action" "must be construed to mean exactly what it says").

The effect of the D.C. Circuit's expansive interpretation of the courts of appeals' power to review FTC cease and desist orders is to narrow the jurisdiction of the district courts under 28 U.S.C. § 1331. Nowhere in the plain language of Section 11 of the Clayton Act is there any indication that Congress intended to deprive the district courts of their original jurisdiction to review orders issued in the course of an FTC administrative proceeding and to curb administrative excesses. *See American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.").

In an earlier action to enjoin an FTC proceeding, Judge Hogan of the D.C. District Court rejected the FTC's proffered expansive interpretation of *TRAC*:

> It would strain credulity to deduce from the generalized terms of *TRAC*'s holding that it was meant to preclude District Court review in all circumstances of any case involving an agency which would have "an effect" on appellate jurisdiction. Otherwise, because of the necessary overlap of federal claims and federal agencies, *TRAC* would cut a swath through this Court's jurisdiction akin to Sherman's march through Georgia.

Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747, 750 (D.D.C. 1986) (considering a request for injunctive relief based upon a constitutional challenge to the FTC's enabling statute), *aff'd in part and vacated in part*, 814 F.2d 731 (D.C. Cir. 1987).

The policy reasons relied on by the court of appeals in this case do not warrant the court's expansion of its exclusive jurisdiction beyond the clear language of Section 11 of the Clayton Act. In *Harrison*, this Court expressly rejected a plea that policy reasons require a construction of an exclusive review statute that is different from its plain terms. *Harrison*, 446 U.S. at 592-93. The Court stated:

> This is an argument to be addressed to Congress, not to this Court. It is not our task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case. Rather, we must determine what Congress intended when it vested the courts of appeals with jurisdiction under [42 U.S.C. § 7607(b)(1) (1988)] to review "any other final action." The language of the statute clearly provides that a decision of the sort at issue here is reviewable in a court of appeals, and nothing in the legislative history points to any different conclusion.

446 U.S. at 593 (citation and footnote omitted). Simply stated, Congress, not the court of appeals, is the appropriate body to weigh the policies inherent in the balance of judicial power. The

task of the courts simply is to enforce the will of Congress, as it has been expressed in the statutes. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985).

Ukiah alleged in its complaint that the full Commission's decision reversing Judge Parker was final agency action and that Ukiah had exhausted its administrative remedies on the threshold question of the FTC's jurisdiction. Nonetheless, the district court and the court of appeals concluded that, under the D.C. Circuit's *TRAC* doctrine, the Court of Appeals for the Ninth Circuit had *exclusive* jurisdiction to consider any action concerning the FTC's proceeding. (App. A; C.) The courts below therefore determined that the district court was divested of jurisdiction to hear Ukiah's action for injunctive relief. (App. c-2.) After five years of proceedings and two years after the agency's final action on the issue of its own jurisdiction, no court has yet addressed the substantive question of the FTC's jurisdiction.

B. The D.C. Circuit's *TRAC* Doctrine Requires Review.

In *TRAC*, the petitioners sought a writ of mandamus from the court of appeals to compel the Federal Communications Commission to decide matters pending before it. *TRAC*, 750 F.2d at 72. Although the parties did not raise the question, the court of appeals requested briefing on the issue whether the court of appeals had jurisdiction to hear the writ and, if so, whether that jurisdiction is exclusive or concurrent with that of the district courts. *Id.* at 74 n.22. In resolving this issue, the court of appeals in *TRAC* held that "where a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review." *Id.* at 72. In the case of Ukiah, by focusing on the expansive language of *TRAC* rather than on the exclusive review provisions of Section 11, the D.C. Circuit eviscerates the federal question jurisdiction of the district courts.

The expansive provisions for appellate review of FCC orders were critical to the *TRAC* court's holding. Section 2342(1) provides that:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

28 U.S.C. § 2342(1) (1988). Section 402(a), in turn, makes reviewable "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [Federal Communications] Commission." 47 U.S.C. § 402(a) (1988). By contrast, Section 11 of the Clayton Act vests the courts of appeals with exclusive jurisdiction over only a single category of FTC orders -- orders to cease and desist. 15 U.S.C. § 21(d). The difference could not be plainer.[10]

The court of appeals ignores its own precedent. In *Cutler v. Hayes*, 818 F.2d 879, 887 n.61 (D.C. Cir. 1987), the D.C. Circuit *sua sponte* clarified that *TRAC* is to be applied with fidelity to the terms of the statutory grant of jurisdiction in question: "Essential to our holding [in *TRAC*] were statutory provisions enabling us to review any final FCC order." After examining the exclusive appellate review provisions of the Food, Drug, and Cosmetic Act,

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[10] Statutes governing appellate review of administrative agency action vary widely in the breadth and specificity of the language employed. *See, e.g.*, 15 U.S.C. § 1710(a) (1988) (review of "an order or determination" of the Secretary of Housing and Urban Development in court of appeals); 16 U.S.C. § 839f(e)(5) (1988) (suits to "challenge the constitutionality" of Pacific Northwest Electric Power Planning and Conservation Act shall be filed in the United States court of appeals for the region); 28 U.S.C. § 2342(4) (exclusive jurisdiction in courts of appeals to review "all final orders of the Atomic Energy Commission"); 28 U.S.C. § 2342(5) (exclusive jurisdiction in the courts of appeals to review "all rules, regulations, or final orders of the Interstate Commerce Commission").

the court concluded that because "no statute commits direct review of FDA new drug regulations to this court, *TRAC* does not apply, and the District Court properly exercised jurisdiction." *Id.*; *see also Association for Regulatory Reform v. Pierce*, 670 F. Supp. 1041, 1045-46 (D.D.C. 1987) (reviewing exclusive review statutes under the Manufactured Housing Act and holding that district court has federal question jurisdiction), *aff'd in part and vacated in part*, 849 F.2d 649 (D.C. Cir. 1988). The court of appeals in this case ignored the holding of *Cutler* and the language of Section 11 of the Clayton Act.[11]

TRAC has left a confused and bitter legacy. Courts have struggled with the broad command of *TRAC* that "any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." *TRAC*, 750 F.2d at 75. In *Ticor Title*, Judge Hogan cautioned that literal interpretation of *TRAC* would "strain credulity." 625 F. Supp. at 750; *see also In re Checkosky*, 142 F.R.D. 4, 6-7 (D.D.C. 1992) (stating that the expansive language of *TRAC* would deprive district courts of authority "even to enforce subpoenas in most agency matters"). The broad language of *TRAC* has produced disparate results in the lower courts. For example, in *Ticor Title*, 625 F. Supp. at 749, Judge Hogan held that *TRAC* does not preclude federal court jurisdiction to hear a constitutional challenge to the FTC's enabling legislation. In *Time Warner Entertainment Co. v. FCC*, 810 F. Supp. 1302, 1303-04 (D.D.C. 1992), Judge Jackson held that *TRAC* does not preclude a district court challenge

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[11] Of the few appellate courts to have cited *TRAC*, *none* have adopted the extreme interpretation of *TRAC* advanced by the court of appeals. In *Public Utility Commissioner v. Bonneville Power Administration*, 767 F.2d 622, 626-27 (9th Cir. 1985), for example, the court held that a provision expressly providing for review, albeit not exclusive, in the courts of appeals, over constitutional challenges to agency action, vested the courts of appeals with exclusive jurisdiction over a constitutional challenge to agency proceedings. *Bonneville Power* merely applies the proposition relied upon by the *TRAC* court in the proper context -- a specific review provision even if not exclusive will be deemed to be so for the kinds of cases specifically enumerated.

to the constitutionality of the FCC's enabling act. In *Checkosky*, 142 F.R.D. at 6-7, Judge Oberdorfer held that *TRAC* does not preclude district court jurisdiction over a petition to perpetuate testimony in agency proceedings. In contrast, in *Jamison v. FTC*, 628 F. Supp. 1548, 1550-51 (D.D.C. 1986), Judge Gasch held that *TRAC* precludes district court jurisdiction to hear a constitutional challenge to the FTC's enabling statute. In *Seminole Pipeline Co. v. Vogt*, 794 F. Supp. 438, 440 (D.D.C. 1992), Judge Richey held that *TRAC* precludes district court jurisdiction to hear a constitutional challenge to agency rules. In *Boozer v. United States*, C.A. No. 88-2867-LFO (D.D.C. Oct. 31, 1988), Judge Oberdorfer held that *TRAC* precludes district court jurisdiction to hear an action to enjoin subpoenas issued by the agency based on a claim of privilege.

The policies relied on by the court in *TRAC* are not relevant in this case. Judge Green, in *Ticor Title Insurance Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987), summarized the limited relevance of the *TRAC* court's policy reasons in the context of purely legal challenges to agency action rather than intervention in ongoing agency process:

> The *TRAC* court's concern for duplicative and potentially conflicting judicial review, while perhaps compelling in cases that implicate the merits of ongoing agency proceedings, is relatively insubstantial in a case such as this, which involves a purely legal question. Indeed, the same duplication, risk of conflict, delay, and expense are present in all cases decided in the lower courts on motions for summary judgment, yet this has not been deemed a sufficient reason to vest exclusive jurisdiction over such cases in the court of appeals.

814 F.2d at 758 (Green, J., concurring). *TRAC* must be applied with fidelity to the statutory grant of exclusive jurisdiction and with a careful appreciation of the policies that *TRAC* advances. The court of appeals' "one size fits all" application of *TRAC*

threatens to swallow the federal question jurisdiction of district courts to hear issues concerning agency action.[12]

C. The Opinion Of The Court Of Appeals Conflicts With This Court's Prior Interpretations Of 28 U.S.C. §§ 1331 And 1337.

In *Leedom v. Kyne*, 358 U.S. 184, 189 (1958), this Court held that district courts have original jurisdiction over suits brought to terminate or strike down agency action that is in excess of the agency's delegated powers. By holding that the district court had no subject matter jurisdiction to consider Ukiah's action for injunctive relief based upon an uncompromising application of its *TRAC* doctrine, the D.C. Circuit has emasculated the original jurisdiction of the district courts to enjoin agency action beyond the scope of statutory authorization. By ousting the district courts of jurisdiction to correct *ultra vires* agency action, the decision judicially overturns the plain congressional command that the district courts shall have subject matter jurisdiction over "all actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. The opinion of the court of appeals conflicts directly with this Court's decision in *Leedom v. Kyne*, and with earlier opinions of the D.C. Circuit and other courts of appeals. *See, e.g., Railway Labor Executives' Ass'n v. National Mediation Bd.*, 988 F.2d 133, 137 (D.C. Cir. 1993); *Elmo Division of Drive-X Co. v. Dixon*, 348 F.2d 342, 345 (D.C. Cir. 1965); *Southern Ry. Co. v. American Train Dispatchers Ass'n*, 948 F.2d 887, 894 (4th Cir. 1991), *cert. denied*, 112 S. Ct.

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[12] The court of appeals' concern that an exception to *TRAC* would create an "endless stream of suits . . . seeking to stall or foreclose agency actions" (App. a-13-14), is misplaced. The court's extreme application of *TRAC* would merely shift suits from the district courts to the courts of appeals based on the *TRAC* doctrine's dubious jurisdictional grounds. Prudential doctrines such as ripeness, exhaustion, finality and standing have served the district courts well in securing the floodgates against the tide of litigation arising from agency action. As explained above, the FTC's ruling reversing Judge Parker is final agency action ripe for review. *See supra* n.9 at 12-13.

1762 (1992); *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 185-86 (4th Cir. 1988); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1209 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Jewel Cos., Inc. v. FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970); *Friends of the Crystal River v. EPA*, 794 F. Supp 674, 685-87 (W.D. Mich. 1992).

In *Leedom v. Kyne*, this Court held that a district court, under 28 U.S.C. § 1337,[13] may enjoin a federal agency acting in excess of its statutory or constitutional authority. Contrary to the express language contained in Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1) (1988), the National Labor Relations Board in *Leedom v. Kyne* certified a mixed professional/nonprofessional bargaining unit. 358 U.S. at 185. A group representing professional employees filed suit in district court alleging that the Board had exceeded its statutory power and praying that the Board's action be set aside. *Id.* at 186. The district court denied the Board's motion to dismiss for lack of jurisdiction, and this Court affirmed. This Court held "that the District Court had jurisdiction of [the] suit." *Id.* at 191.[14] This Court rejected the Board's attempt to characterize the suit as an effort to "review" agency action:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order

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[13] Section 1337 confers original jurisdiction on the district courts over "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337(a). Ukiah alleged jurisdiction in the district court under Sections 1331 and 1337.

[14] The Board urged that Section 10(c) of the Act, which vested the courts of appeals with exclusive jurisdiction to review final orders of the Board, stripped the district courts of their original jurisdiction under Section 1337. *Leedom v. Kyne*, 358 U.S. at 187.

> of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

358 U.S. at 188.[15]

It is Ukiah's position in this case that the FTC has "attempted [to] exercise [a] power that ha[s] been specifically withheld," as did the NLRB in *Leedom v. Kyne*, 358 U.S. at 189. Ukiah contends that the FTC has ignored the clear terms of Section 7 of the Clayton Act, which confer no jurisdiction on the FTC to investigate, prosecute, or otherwise regulate the Ukiah transaction, an assets acquisition by a not-for-profit hospital. *See infra* at 23-26. Administrative Law Judge Parker agreed with this contention. (App. D, E.) The district court clearly had jurisdiction under Sections 1331 and 1337 to make the threshold determination whether or not the FTC has exceeded its statutory mandate. *Champion Int'l*, 850 F.2d at 185-86. Rather than considering the merits of Ukiah's serious challenge to the agency's jurisdiction, the district court transferred the action for injunctive relief to the Ninth Circuit, based upon *TRAC*.[16] To the extent that the D.C. Circuit's *TRAC* doctrine required this result, it has done violence

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[15] As in *Leedom v. Kyne*, in this case the appellate mechanisms are inadequate to vindicate Ukiah's rights. *See Leedom v. Kyne*, 358 U.S. at 190. Ukiah, as a not-for-profit institution, is exempt from antitrust regulation under Section 7 of the Clayton Act. *See infra* at 23-26. Review from a final decision on the merits will be neither meaningful nor adequate. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985) (denial of motion to dismiss immediately appealable when motion to dismiss grounded on claim of qualified immunity from suit). *Board of Governors v. MCorp. Financial, Inc.*, 112 S. Ct. 459, 466 (1991), is different. In *MCorp*, the statute specifically precluded any court from exercising jurisdiction over any action to enjoin orders or notices. *See* 12 U.S.C. § 1818(i)(1) (1988).

[16] The anomalous result of the transfer order is that the Ninth Circuit Court of Appeals now has before it Ukiah's injunction action. Because the district court had jurisdiction, the transfer order was clearly erroneous. *See* 28 U.S.C. § 1631 (transfer upon finding of want of jurisdiction). The transfer order also should have been appealable under the concurrent jurisdiction exception of *Goble v. Marsh*, 684 F.2d 12 (D.C. Cir. 1982). (App. a-6-7.)

to the federal question jurisdiction of the district courts under Sections 1331 and 1337.

II.
The FTC Has No Jurisdiction Over The Ukiah Transaction Under Section 7 Of The Clayton Act.

Section 7 of the Clayton Act confers no jurisdiction on the FTC to investigate or prosecute the Ukiah assets acquisition. Ukiah's objection to the FTC's exercise of jurisdiction over the Ukiah transaction raises a serious question of subject matter jurisdiction which the agency's own Administrative Law Judge ruled warranted dismissal and as to which courts in the Fourth, Seventh, and Eleventh Circuits recently have split.[17] The question deserves early and serious judicial review.

The question of the FTC's jurisdiction over the Ukiah transaction, like the other jurisdictional questions presented, may be resolved by reference to the plain terms of the jurisdictional grant. *See Community for Creative Non-Violence v. Reid*, 490

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[17] Prior to the full Commission's decision in Ukiah's case, four tribunals addressed the issue of the FTC's jurisdiction under the Clayton Act over assets acquisitions by not-for-profit entities. The results are conflicting. The district court in *United States v. Carilion Health System*, No. 88-0249-R, slip op. at 3-6 (W.D. Va. Sept. 30, 1988), dismissed the Justice Department's Section 7 count, concluding that the government had no jurisdiction under Section 7 to prosecute an assets acquisition by a not-for-profit entity. The court reaffirmed its holding in a later decision that found no Sherman Act violation. *United States v. Carilion Health System*, 707 F. Supp. 840, 841 n.1 (W.D. Va.), *aff'd without op.*, 892 F.2d 1042 (4th Cir. 1989). Judge Parker in the proceedings below also concluded that the FTC lacked jurisdiction under Section 7. (App. E.). In a discussion that the FTC concedes is dicta (App. f-37), the Seventh Circuit suggested that the Department of Justice has jurisdiction under Section 7 of the Clayton Act over an assets acquisition by a not-for-profit entity. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1280-81 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990). The Eleventh Circuit, in *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991), allied with the Seventh Circuit and held that the FTC has jurisdiction under the Clayton Act.

U.S. 730, 739 (1989); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

Section 7 of the Clayton Act states:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the *stock or other share capital* and no person *subject to the jurisdiction of the Federal Trade Commission* shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (emphasis added).

Section 7 has two express jurisdictional prongs which reach: (1) acquisitions of stock or other share capital; and (2) pursuant to the 1950 Amendments, acquisitions of assets by persons subject to the jurisdiction of the Federal Trade Commission. By its express terms, Section 7 does not apply to the Ukiah transaction.

The first prong of Section 7 reaches acquisitions of "stock or other share capital." It does not apply in this case because Ukiah, as a not-for-profit, does not issue stock and did not acquire any stock or other share capital. (App. e-6.) Moreover, courts already have rejected any strained attempt to interpret the terms "stock or other share capital" to mean any form of control. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1281 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990); *United States v. Carilion Health System*, No. 88-0249-R, slip op. at 3-6 (W.D. Va. Sept. 30, 1988), *aff'd on other grounds without op.*, 892 F.2d 1042 (4th Cir. 1989).

The second jurisdictional prong of Section 7 reaches assets acquisitions by persons "subject to the jurisdiction of the [FTC]." It does not apply in this case because Ukiah Valley and Adventist Health System/West are not persons subject to the jurisdiction of the FTC.[18] The FTC's jurisdiction never has included not-for-profit entities.[19] Under Section 4 of the FTC Act, Congress granted the FTC authority to regulate "any company . . . or association, incorporated or unincorporated, which is organized to carry on business *for its own profit or that of its members*." 15 U.S.C. § 44 (emphasis added). Ukiah Valley and Adventist Health System/West are non-stock charitable entities which do not operate for their own profit or for the profit of any member. Neither, therefore, is subject to the jurisdiction of the FTC.

This Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), made it clear that the "subject to the jurisdiction of the [FTC]" provision in Section 7 is to be interpreted by reference to the FTC Act:

> By its terms, the present § 7 reaches acquisitions of corporate stock or share capital by any corporation

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[18] The FTC relies heavily upon the definition of "person" under the Clayton Act, 15 U.S.C. § 12(a) (1988). However, the plain language of Section 7 of the Clayton Act requires covered "persons" to be "subject to the jurisdiction of the [FTC]". 15 U.S.C. § 18.

[19] *See Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1020-22 (8th Cir. 1969); *In re Ohio Christian College*, 80 F.T.C. 815, 847-49 (1972). The FTC's recent interest in assets acquisitions by not-for-profits is an unvarnished effort to expand its jurisdiction beyond statutory confines that the FTC has recognized in the past. *See Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcommittee on Consumer Protection and Finance of the House of Representatives Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977) (statement of Hon. Calvin J. Collier, Chairman, FTC); *Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House of Representatives Committee on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (statement of William C. McLeod, Director of the FTC's Bureau of Consumer Protection).

> engaged in commerce, *but it reaches acquisitions of corporate assets only by corporations "subject to the jurisdiction of the Federal Trade Commission." The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. § 45 (a)(6). Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7.*

Id. at 335-36 (emphasis added) (footnotes omitted). The Court reiterated this point when it noted that:

> Nothing in this opinion, of course, limits the power of the FTC, under §§ 7 and 11 . . . *where the acquiring corporation is subject to the FTC's jurisdiction*, see 15 U.S.C. § 45(a)(6). . . .

Id. at 345 n.22 (emphasis added). Clearly, the FTC Act is the reference point for interpreting Section 7, as expressly dictated by this Court. The FTC has no jurisdiction to investigate, prosecute, or otherwise exercise jurisdiction over the underlying assets acquisition by a not-for-profit entity.

III.

The Court Of Appeals Erred In Dismissing Ukiah's Appeal From The District Court's Denial Of Ukiah's Motion For A Preliminary Injunction.

Section 1292(a)(1) provides that the courts of appeals "*shall have* jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (emphasis added). In no uncertain terms, the district court denied Ukiah's motion for preliminary injunction.

> Thus, it hereby is ORDERED, that the plaintiffs' motion for a preliminary injunction is denied.

(App. c-2.) The court of appeals ignored the district court's order denying Ukiah's motion for a preliminary injunction, and held that Section 1292(a)(1) "does not provide a jurisdictional basis for reviewing the *transfer* order." (App. a-7 (emphasis added).)[20]

That order was immediately appealable as of right to the court of appeals. *EEOC v. Kerrville Bus Co., Inc.*, 925 F.2d 129, 132 (5th Cir. 1991) (if the order "specifically denies an injunction, then under § 1292(a)(1) that order is appealable as of right, right away"). As the court of appeals recognized, the merits of the preliminary injunction and the transfer order involve independent issues. (App. a-8.) The right to appeal the order denying the preliminary injunction under Section 1292(a)(1) is unaffected by the transfer order. The court of appeals clearly erred by failing to heed the mandate of Section 1292(a)(1).[21]

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[20] The court of appeals relied exclusively on *Raines v. Block*, 798 F.2d 377 (10th Cir. 1986). Unlike this case, however, the district court in *Raines* did not dismiss the plaintiff's claims for injunctive relief. *See Raines v. Block*, 599 F. Supp. 196, 199 (D. Colo. 1984).

[21] Moreover, this Court has held that appellate jurisdiction extends to "*orders that have the practical effect* of granting or denying injunctions and have 'serious, perhaps irreparable, consequence.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988) (emphasis added) (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981)); *I.A.M. Pension Fund v. Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir.), *cert. denied*, 479 U.S. 971 (1986). Because the court of appeals in this case affirmed the order transferring the preliminary injunction action to the Ninth Circuit Court of Appeals, rather than remanding to the district court to hear the merits of the injunctive action, the transfer order indeed had the practical effect of denying the injunction with irreparable consequences.

CONCLUSION

For all of the foregoing reasons, Ukiah respectfully requests that this Court reverse the order of the United States Court of Appeals for the District of Columbia Circuit and remand with instructions to remand to the district court for hearing of Ukiah's motion for preliminary injunction. In the alternative, Ukiah requests that this Court consider the question of the FTC's jurisdiction over the Ukiah transaction on the merits, and enjoin the FTC proceeding on the ground that it is beyond the FTC's statutory mandate.

Respectfully submitted,

Thomas Campbell
(Counsel of Record)
Deborah H. Bornstein
James W. Teevans
Daniel D. McDevitt

GARDNER, CARTON & DOUGLAS
321 North Clark Street
Chicago, Illinois 60610-4795
(312) 644-3000

Attorneys for Petitioners Ukiah Adventist Hospital, now known as Ukiah Valley Medical Center, and Adventist Health System/West

Of Counsel:
Diane P. Wood
1111 East 60th Street
Chicago, Illinois 60637

June 21, 1993

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

UKIAH ADVENTIST HOSPITAL, a California not-for-profit corporation, now known as UKIAH VALLEY MEDICAL CENTER, and ADVENTIST HEALTH SYSTEM/WEST, a California not-for-profit corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS CAMPBELL
(Counsel of Record)
DEBORAH H. BORNSTEIN
JAMES W. TEEVANS
DANIEL D. MCDEVITT

GARDNER, CARTON & DOUGLAS
321 North Clark Street
Chicago, IL 60610-4795
(312) 644-3000

Attorneys for Petitioners

Of Counsel:
DIANE P. WOOD
1111 East 60th Street
Chicago, IL 60637

June 21, 1993

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APPENDIX A

OPINION OF THE D.C. CIRCUIT
DECEMBER 29, 1992

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued Oct. 26, 1992 Decided Dec. 29, 1992

No. 91-5349

UKIAH ADVENTIST HOSPITAL,
A CALIFORNIA NOT-FOR-PROFIT CORPORATION,
NOW KNOWN AS
UKIAH VALLEY MEDICAL CENTER, AND
ADVENTIST HEALTH SYSTEM/WEST, A
CALIFORNIA NOT-FOR-PROFIT CORPORATION,
APPELLANTS,

v.

FEDERAL TRADE COMMISSION,
APPELLEE.

On Appeal from the United States District Court
for the District of Columbia
(No. 91-2320)

Before: EDWARDS, SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: Appellants Ukiah Adventist Hospital and Adventist Health System/West ("AHS/West") seek review of an order issued by the District Court, transferring this action to the United States Court of Appeals for the Ninth Circuit. The appellants filed suit in the District Court, seeking to enjoin the Federal Trade Commission ("FTC") from proceeding with an administrative complaint against them for allegedly violating section 7 of the Clayton Act, 15 U.S.C. § 18 (1988). The District Court, relying on this court's decision in *Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*"TRAC"*), determined that it lacked jurisdiction to entertain the action and transferred the case pursuant to 28 U.S.C. § 1631 (1988).[1]

We address two questions on appeal. We must first determine whether a transfer order under 28 U.S.C. § 1631 is appealable. Because we reject the appealability of such an order, we must also consider whether there is any basis for this court, under the All Writs Act, 28 U.S.C. § 1651(a)(1988), to issue a writ of mandamus requiring the District Court to rescind the order transferring the case to the Ninth Circuit. On this latter question, we hold that the District Court has not remotely approached the abuse of authority necessary to warrant such a writ. We therefore leave undisturbed the District Court's order transferring this action to the Ninth Circuit.

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[1] Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

I. BACKGROUND

In August 1988, Ukiah Adventist Hospital (now known as Ukiah Valley Medical Center), a small, not-for-profit hospital in Ukiah, California, acquired substantially all of the assets of Ukiah Hospital Corporation, which owned and operated Ukiah General Hospital, also located in Ukiah. AHS/West, a major hospital chain, controls or manages 20 not-for-profit corporations, including Ukiah Valley Medical Center, and AHS/West and Ukiah Valley Medical Center have the same board of directors.

In November 1989, the FTC issued an administrative complaint against Ukiah Valley Medical Center and AHS/West (jointly, "Ukiah"), charging that it had reason to believe that the acquisition of Ukiah Hospital Corporation violated section 7 of the Clayton Act. Ukiah moved to dismiss the complaint on January 19, 1990, asserting that the FTC lacked jurisdiction under section 7 to challenge assets acquisitions by not-for-profit entitles.

Shortly after the commencement of the FTC proceeding, Ukiah filed suit in the United States District Court for the Northern District of California, seeking to enjoin the FTC proceeding. On January 30, 1990, the district court dismissed the case, ruling that the FTC had not taken any final agency action that would be subject to judicial review. *Ukiah Valley Medical Ctr. v. FTC*, 1990-1 Trade Cas. (CCH) ¶ 68,196, at 69,902 (N.D. Cal. Jan. 30, 1990). The Ninth Circuit affirmed the district court on August 13, 1990. *Ukiah Valley Medical Ctr. v. FTC*, 911 F.2d 261 (9th Cir. 1990).

In the interim, on August 2, 1990, an administrative law judge ("ALJ") at the FTC dismissed the administrative complaint against Ukiah, finding that an assets acquisition by a not-for-profit organization could not be challenged under section 7 of the Clayton Act. ALJ Decision at 19, *reprinted in* Appellants' Appendix ("A.") 91. Exactly one year later, the full Commission reversed the ALJ's decision. *Adventist Health System/West*, Docket No. 9234 (Aug. 2, 1991), *reprinted in* A. 26. Because no discovery or hearings had been held on the issue of liability under section 7, the Commission remanded the case for further proceedings.

In the belief that the full Commission's decision constituted final agency action, Ukiah filed this suit in the United States District Court for the District of Columbia on September 13, 1991, again seeking a preliminary injunction to halt the FTC proceeding. The FTC moved the court to transfer the case to the Ninth Circuit, or, alternatively, to dismiss the action. On October 17, 1991, the District Court issued an order denying the motion for a preliminary injunction and granting the transfer motion. *Ukiah Adventist Hosp. v. FTC*, Civ. Action No. 91-2320, mem.ord. at 2-3, 1991, *reprinted in* A. 172-73. The trial court found that it was without jurisdiction to entertain the suit, because under 15 U.S.C. § 21(c), (d) (1988), the courts of appeals are vested with exclusive jurisdiction to review final cease and desist orders issued by the FTC, and, under this court's decision in *TRAC*, a district court has no jurisdiction to hear claims for relief from nonfinal agency action if review of final action is vested exclusively in the courts of appeals. Accordingly, the District Court transferred the case to the Ninth Circuit, pursuant to 28 U.S.C. § 1631. Ukiah then filed this appeal.

II. Discussion

A. *Appealability*

Ukiah maintains that this court has jurisdiction under 28 U.S.C. § 1292(a)(1) (1988) to review the District Court's denial of a preliminary injunction motion, and under 28 U.S.C. § 1291(1988) to review what Ukiah believes was a dismissal of the action for lack of subject matter jurisdiction. We find scant authority, however, to support the assertion of appellate review in this court.

As a general principle, it is well settled that transfer orders are not appealable final orders. *See Wiren v. Laws*, 194 F.2d 873, 874 (D.C. Cir. 1951); *Howard Elec. & Mechanical Co., Inc. v. Frank Briscoe Co., Inc.*, 754 F.2d 847, 850-51 (9th Cir. 1985). Nor are transfer orders reviewable under the collateral order doctrine. *See Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 343

(8th Cir. 1990); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 772 (3d Cir. 1984). This rule against appealability applies to orders under 28 U.S.C. § 1404(a) (1988), transferring a case from one proper venue to another, *see Wiren*, 194 F.2d at 874; *Frank Briscoe*, 754 F.2d at 850-51; *Ford Motor Co. v. Ryan*, 182 F.2d 329, 329-30 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950), and to orders under 28 U.S.C. § 1406(a) (1988), transferring a case in which venue was laid improperly, *see Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 228-30 (3d Cir. 1990).

Following this settled ruled against appealability, several circuits recently have held that no appeal lies from transfer orders issued pursuant to section 1631.[2] *See Persyn v. United States*, 935 F.2d 69-72-73 (5th Cir. 1991) (transfer from district court to Claims Court); *Alimenta (USA), Inc. v. Lyng*, 872 F.2d 382, 383-85 (11th Cir. 1989)(same); *Raines v. Block*, 798 F.2d 377, 379-80 (10th Cir. 1986)(same); *Middlebrooks v. Smith*, 735 F.2d 431, 432-33 (11th Cir. 1984)(transfer between district courts). In *Persyn*, for example, the court found a section 1631 order appealable neither as a final order under 28 U.S.C. § 1291, nor as an interlocutory order under 28 U.S.C. § 1292(b) (1988), because -- as in this case -- the district court had not certified the transfer order for review. *See Persyn*, 935 F.2d at 72.[3] The decisions in *Persyn*, *Alimenta*, *Raines* and *Middlebrooks* reflect the common sense view that section 1631 orders are interlocutory for the same reason that venue transfer are: the very purpose of transfer

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[2] This provision was enacted as part of the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164 § 301(a), 96 Stat. 25, 55 (1982).

[3] The *Persyn* court further refused to review the order under the collateral order doctrine. The court noted that interlocutory orders are only appealable under that doctrine if they would be effectively unreviewable on appeal from final judgment. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). The collateral order exception did not apply, the court concluded, because the district court's transfer order would not be subject to review in the transferee court. *See Persyn*, 935 F.2d at 73.

provisions is to allow the case to continue, rather than terminating it. See *Middlebrooks*, 735 F.2d at 432.[4]

Ukiah suggests three grounds on which we might review the transfer order. We find none of the grounds persuasive. Ukiah first contends that we have jurisdiction under section 1291 because the District Court dismissed the case for lack of subject matter jurisdiction. This argument mischaracterizes the District Court's order, for the court did not dismiss the case. A transfer order keeps the case alive; an order dismissing the case brings the action to an end. *See Noxell Corp. v. Firehouse No. 1 Bar-B-que Restaurant*, 760 F.2d, 312, 317 (D.C. Cir. 1985) (instructing district court on remand to dismiss action *instead* of transferring it).

Second, Ukiah relies on our opinion in *Goble v. Marsh*, 684 F.2d 12 (D.C. Cir, 1982), apparently for the proposition that section 1631 transfer orders *are* appealable in some circumstances. That decision, however, is inapplicable here. In *Goble*, this court reviewed under the collateral order doctrine a district court order transferring a case to the Court of Claims (now the Claims Court) pursuant to former 28 U.S.C. § 1406(c),[5] which authorized transfer to that court when a case within its exclusive jurisdiction was filed in district court. The dispute in *Goble* was whether plaintiffs had effectively waived any claims against the Government exceeding $10,000, in which case the district court and the Court of Claims would have had *concurrent* jurisdiction over the action, and the district court would not have had authority order the

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[4] Review of a transfer order in a transferee court is exceedingly limited. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 819 (1988). In *Christianson*, the Supreme Court made clear that a transferee court is not bound by a section 1631 transfer order that the transferee court determines to be "'clearly erroneous.'" *Id.* (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)). The Court stated that such "reversals" should be exceptional, and that "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Id.*

[5] Law of Sept. 13, 1960, Pub.L. No. 86-770, § 1, 74 Stat. 912, 912 (repealed 1982). Section 1631 now provides authority for such transfers.

transfer. This court took the appeal on the ground that the transfer order be otherwise unreviewable. The court apparently reasoned that since the Court of Claims had jurisdiction over the action regardless of the dollar amount in issue, any error in transferring the action would be found harmless should the plaintiffs appeal to the Federal Circuit from a final judgment in the Court of Claims. *See id.* at 14; *Persyn*, 935 F.2d at 73 (discussing *Goble*).

The *Goble* problem, that concurrent jurisdiction defeats review of a transfer order, does not exist here, so that even were we to extend the reasoning of *Goble* to section 1631 transfers, the District Court's order in this case would not be appealable. Under our decision in *TRAC*, the district courts and the courts of appeals do not have concurrent jurisdiction over claims regarding nonfinal agency action. *See TRAC*, 750 F.2d at 77-78. We therefore, find *Goble* inapplicable. *See also Alimenta*, 872 F.2d at 384-85 (noting inapplicability of *Goble* outside context of concurrent jurisdiction); *Raines*, 798 F.2d at 379 (same); 15A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.12, at 725 (2d Ed. 1992) ("15A WRIGHT & MILLER")(stating there is little reason to allow appeals of section 1631 orders other than in concurrent jurisdiction context).

Finally, Ukiah suggests that the District Court's order to transfer is appealable under 28 U.S.C. § 1292(a)(1) because it also involved the denial of a preliminary injunction. We reject this contention. In *Raines*, the Tenth Circuit held that where, as here, a plaintiff seeks injunctive relief and the district court transfers the action under section 1631 without reaching the merits of the injunction claim, section 1292(a)(1) does not provide a jurisdictional basis for reviewing the transfer order. *See Raines*, 798 F.2d at 380. As the court in *Raines* noted:

> Contrary to plaintiffs' assertion, the order transferring their action was not equivalent to denial of an injunction. The district court did not reach the merits of plaintiffs' claim, as it must to determine the need for an injunction. Thus 28 U.S.C. § 1292(a)(1) does not provide a basis for our jurisdiction.

Id. We are unable to identify a reasonable basis for departing from the judgment in *Raines*.

We recognize that some courts have held that interlocutory review of an order transferring a case pursuant to section 1404(a) is available where the order also denies a preliminary injunction. *See United States Aluminum Corp. v. Kawneer Co., Inc.*, 694 F.2d 193, 195 (9th Cir. 1982); *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 (8th Cir. 1979); *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860 (1277); *see also* 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3855, at 474 (2d ed. 1986) ("[I]f there is an interlocutory appeal from the grant or denial of a preliminary injunction, the appellate court has power, if it sees fit, to consider at that time a ruling on a transfer motion.") This rule has been found inapposite, however, in situations where the merits of the transfer and the preliminary injunction involve separate, independent issues. *See Nordin*, 897 F.2d at 343. Indeed, the same commentators that advocate reviewability of transfer orders issued with injunctive orders endorse this distinction, and suggest that review is most appropriate when "the transfer and injunction rulings are closely related...." 15A WRIGHT & MILLER, *supra*, § 3914.12, at 722. In the instant case, the transfer order reflects nothing more than an identification of the proper court, under *TRAC*, to decide the claim for injunctive relief. The claim for injunctive relief, however, implicates the scope of section 7 of the Clayton Act. These two questions are wholly unrelated.

In conclusion, we believe that no appeal lies from the District Court's order transferring this case to the Ninth Circuit pursuant to section 1631.

B. *Review on Petition for Mandamus*

While transfer orders are not appealable as a general rule, this rules does not foreclose all review of such orders in the transferor circuit. Pursuant to the All Writs Act, this court "may issue all writs necessary or appropriate in aid of" its jurisdiction, including

the writ of mandamus. 28 U.S.C. § 1651(a). The Supreme Court had admonished that the remedy of mandamus is "drastic," and should be invoked only in "extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). Nevertheless, "the writ is available to prevent abuses of a district court's authority to transfer a case." *In re Chatman-Bey*, 718 F.2d 484, 486 (D.C. Cir. 1983). This court has entertained petitions for mandamus to review section 1404(a) transfer orders upon a variety of allegations, including, for example, that the district court lacked power to transfer the case to a court of improper venue, *see In re Scott*, 709 F.2d 717, 719-20 (D.C. Cir. 1983); *Relf v. Gasch*, 511 F.2d 804, 808 (D.C. Cir. 1975), failed to consider the applicable statutory criteria, *see Wiren*, 194 F.2d at 875, or transferred the case without providing a hearing, *see Fine v. McGuire*, 433 F.2d 499, 501-02 (D.C. Cir. 1970).

In this case, Ukiah alleges that the District Court was properly vested with jurisdiction to hear this action; thus, according to Ukiah, the court had no authority to order the transfer, because a section 1631 transfer may only be made if the court lacks jurisdiction. *See* 28 U.S.C. § 1631; *Town of N. Bonneville v. United States Dist. Court*, 732 F.3d 747, 750 (9th Cir. 1984) (section 1631 transfer may be reviewed under All Writs Act where petitioner alleges that district court has jurisdiction over action). We therefore consider the alleged abuse of judicial authority on Ukiah's petition for mandamus.[6]

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[6] Originally, Ukiah merely filed a Notice of Appeal, with no mention of mandamus. This oversight apparently came to Ukiah's attention after the FTC moved for dismissal of the appeal, noting that Ukiah had not petitioned for mandamus. In response to the FTC's motion, Ukiah requested that the "notice of appeal be considered as a petition for a writ of mandamus." Response to Defendant-Appellee's Motion to Dismiss Appeal or for Summary Affirmance or, in the Alternative, Plaintiffs-Appellants' Petition for a Writ of Mandamus at 2. Ukiah repeated this request in its reply brief. *See* Reply Brief for Appellants at 5 n. 1. We shall treat the appeal in this case as a petition for mandamus, as other circuits have done in similar circumstances. *See, e.g., Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 749 (2d Cir. 1991) (court finds lack of appellate jurisdiction but treats

(continued...)

Turning to the merits of the transfer,[7] we find that the District Court has not even remotely approached committing the sort of abuse of its authority that would warrant granting a petition for mandamus. There are three elements to a section 1631 transfer: (1) there must be a lack of jurisdiction in the district court, *see Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 80 (D.C. Cir. 1985); (2) the transfer must be in the interest of justice, *see id.*; and (3) the transfer can be made only to a court in which the action could have been brought at the time it was filed or noticed, *see Town of N. Bonneville*, 732 F.2d at 750. The District Court's decision in this case satisfies all three requirements, and we therefore find that the court acted well within its authority in transferring the instant action to the Ninth Circuit.

First, the court correctly determined that it lacked jurisdiction to entertain the action under this court's decision in *TRAC*. In *TRAC*, we held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." 750 F.2d at 75 (footnote omitted). This case meets the criteria set out in *TRAC* for exclusive circuit court jurisdiction. It is undisputed that review of FTC cease and desist orders is committed to the courts of appeals pursuant to 15 U.S.C. § 21(c), (d).[8] *See Ticor Title Ins.*

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[6](...continued)
notice of appeal as petition for writ of mandamus upon appellant's request); *Beard v. Carrollton R.R.*, 893 F.2d 117, 120 (6th Cir. 1989) (court treats appeal as petition for mandamus upon request made in appellant's brief).

[7] On January 8, 1992, this court issued a per curiam order staying transfer of the record to the Ninth Circuit pending appeal, and the case file physically remains with this court. Thus, we have retained jurisdiction to review the transfer order on petition for mandamus.

[8] Section 21(c)provides in part:

> Any person required by [an] order of the commission, board, or Secretary to cease and desist from ... violation [of, *inter alia*, section 7 of the (continued...)

Co. v. FTC, 814 F.2d 731, 743 (D.C. Cir. 1987) (opinion of Edwards, J.). Moreover, the District Court's disposition of this case "might affect the Circuit Court's future jurisdiction," *TRAC*, 750 F.2d at 75, for if the District Court enjoins the FTC proceeding against Ukiah as requested, "the statutory obligation of a Court of Appeals to review [the FTC's order] on the merits may be defeated...." *Id.* at 76. The District Court therefore properly found that under *TRAC*, it was divested of jurisdiction to entertain Ukiah's claim.

Ukiah suggests that *TRAC* does not prohibit parties to FTC proceedings from petitioning district courts for review of challenges to the FTC's jurisdiction, so long as those jurisdictional challenges present purely legal questions, as opposed to mixed questions of law and fact.[9] In making this argument, Ukiah seeks to skirt our broadly worded statement in *TRAC* that, "[b]y lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power." *Id.* at 77. Ukiah responds that jurisdictional challenges of the sort it mounts are not within the "class of claims" which are "covered" by the review power conferred on the circuit courts by 15 U.S.C. § 21(c), (d). We reject this argument.

To be sure, the question of what constitutes the "class of claims" reserved solely for appellate review under *TRAC* has not been entirely resolved. In the case of FTC action, the class of

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[8](...continued)

> Clayton Act] may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business....

Section 21(d) provides:

> Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission, board, or Secretary shall be exclusive.

[9] Ukiah sets up what it believes is a purely legal challenge to the FTC's jurisdiction, namely, whether section 7 of the Clayton Act extends to assets acquisitions by not-for-profit hospitals.

claims is unquestionably *not* limited, as Ukiah suggests, to final cease and desist orders. If it were so limited, the entire holding and purpose of *TRAC* would be eviscerated, for *TRAC* seeks to identify those claims, *in addition to* claims regarding final agency action, over which the courts of appeals exercise exclusive jurisdiction. *TRAC*-type cases have tended to focus on one category of nonfinal agency action--unreasonable agency delay. *See, e.g., In re Monroe Communications Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988); *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1485 (D.C. Cir. 1985). But "neither the language nor rationale of [*TRAC*]" indicates that its reach is limited to such claims. *Ticor*, 814 F.2d at 757 (opinion of Joyce Hens Green, J.). Indeed, the *TRAC* opinion suggested that its holding would apply, for example, to constitutional claims of agency bias and prejudgment. *See TRAC*, 750 F.2d at 74-75 & n. 23, 77 & n. 30.

We find that Ukiah's jurisdictional challenge to the FTC proceeding in this case falls within the class of claims reserved solely for the jurisdiction of the courts of appeals. In reaching this determination, we are guided by language in the *TRAC* opinion that Ukiah fails to discuss. We suggested in *TRAC* that a claim for relief relating to nonfinal agency action would fall within the general federal question jurisdiction of the district courts, only "where a denial of review in the District Court will truly foreclose all judicial review...." 750 F.2d at 78. As an example of a situation where a district court might exercise its original jurisdiction over nonfinal agency action, we pointed to *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), where the Supreme Court held that a district court could entertain a claim that the National Labor Relations Board had violated an express statutory command, because the plaintiff had *no* other means of obtaining review of the agency action. That is not the case here. Ukiah will be free to mount a challenge to the FTC's jurisdiction on review of any final cease and desist order the FTC might issue, and, therefore, denial of review in a district court will *not* foreclose all judicial review. We thus conclude that a jurisdictional

challenge to an ongoing agency proceeding falls within the "class of claims" exclusively vested in the courts of appeals under *TRAC*.

Seeking to avoid the conclusion that *TRAC* applies to its claim, Ukiah likens its jurisdictional challenge in this action to a constitutional attack on the FTC's enabling statute in an ongoing proceeding, a claim which at least one district court in this circuit found within its jurisdiction under *TRAC*. *See Ticor Title Ins. Co. v. FTC*, 625 F.Supp. 747, 749 (D.D.C. 1986), *aff'd on other grounds*, 814 F.2d 731 (D.C. Cir. 1987). Ukiah insists that this case, like the constitutional challenge in *Ticor*, involves a purely legal question that does not, like more fact-intensive agency disputes, require deference to appellate expertise. Ukiah reasons that since the rule in *TRAC* was grounded in part on the fact that the courts of appeals have developed expertise in review of administrative action, those claims that do not require such expertise for their resolution should not fall within the "class of claims" exclusively vested in the courts of appeals. We find Ukiah's argument unconvincing. Although we intimate no view on whether a constitutional challenge such as that in *Ticor* would be committed exclusively to the courts of appeals under *TRAC*,[10] we conclude that a challenge, as here, to the FTC's jurisdiction on statutory grounds does not belong to the "small category of cases," *TRAC*, 750 F.2d at 78, seeking relief from nonfinal agency action that falls within a district court's general federal question jurisdiction.

Our conclusion is supported by compelling policy concerns. Allowing questions of jurisdiction to be "carved out" of ongoing agency proceedings and challenged in district courts would create an unmanageable body of litigation in the federal courts. By establishing an "agency jurisdiction" exception to the *TRAC* rule, we would invite an endless stream of suits filed in district courts, followed by appeals to this court, by parties seeking to stall or

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[10] This court affirmed the district court's decision in *Ticor* without deciding whether the constitutional challenge at issue "could ever be so separate from the underlying agency proceedings" that the district court could exercise original jurisdiction over the action. *Ticor*, 814 F.2d at 743 (opinion of Edwards J.).

foreclose agency action. Ukiah's proffered distinction between "purely legal" and "mixed law and fact" jurisdictional questions only exacerbates this concern. Ukiah asks us to draw a line where no line may be drawn--or, just as accurately, where any line may be drawn. As any observer familiar with administrative law knows, the courts have proven notoriously inconsistent in attempting to draw distinctions between questions of fact and law. *See generally* 5 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.9, at 365-69 (2d ed. 1984) (describing broad outlines of problem). Even were we to find it easy to draw the suggested distinction in this particular case, we can imagine no reason for adopting such a rule. We therefore hold that *all* challenges to an agency's jurisdiction in the context of nonfinal agency action lie within the exclusive jurisdiction of the courts of appeals under *TRAC*.

Second, although the District Court did not make an explicit finding on the point, it seems plain that the transfer--*in lieu of dismissal*--was "in the interest of justice." As we recently noted, "[i]n applying *TRAC* to a case lodged in the wrong court, the appropriate course, normally, is to transfer...." *American Foreign Serv. Ass'n v. Baker*, 895 F.2d 1460, 1461 (D.C. Cir, 1990); *see TRAC*, 750 F.2d at 79 n. 37.

Finally, we conclude that the District Court correctly determined that the Ninth Circuit was a "court in which the action or appeal could have been brought at the time it was filed or noticed...." 28 U.S.C. § 1631. Under 15 U.S.C. § 21(c), any "person" who has received a cease and desist order from the FTC may obtain review of the order in "the court of appeals ... for any circuit within which [a] violation [of section 7 of the Clayton Act] occurred or within which such person resides or carries on business...." Since the alleged violation of section 7 occurred in California, and since appellants acknowledge that both Ukiah Valley Medical Center and AHS/West are California not-for-profit corporations, any final FTC cease and desist order will only be reviewable in the Ninth Circuit. Since the Ninth Circuit court of appeals has exclusive prospective jurisdiction over the FTC proceeding, it is the only court of appeals, under *TRAC*, that may

review Ukiah's challenge to the FTC's jurisdiction in an ongoing agency proceeding.[11] In sum, we find that the District Court properly transferred the case to the Ninth Circuit, and has not, by any measure, committed an abuse of authority that would necessitate issuing a writ of mandamus.

III. Conclusion

We find that while we lack jurisdiction to entertain Ukiah's appeal of the District Court's transfer order, we may nevertheless review that order pursuant to the All Writs Act. Obliging Ukiah's request that we treat its appeal as a petition for mandamus, we deny that petition on the ground that the District Court acted well within the ambit of its authority in transferring this action to the Ninth Circuit under 28 U.S.C. § 1631.

So Ordered.

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[11] We note that the Ninth Circuit has adopted the holding in *TRAC*, *see, e.g.*, *Clark v. Busey*, 959 F.2d 808, 811-12 (9th Cir. 1992); *Public Util. Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985), so the District Court was correct in transferring the case to the court of appeals and not the district court.

APPENDIX B

ORDER DENYING REHEARING
MARCH 23, 1993

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5349 September Term, 1992
CV 91-2320

Ukiah Adventist Hospital, A California Not-For-Profit Corporation Now known as Ukiah Valley Medical Center, and Adventist Health System/West, A California Not-For-Profit Corporation,
Appellants

v.

Federal Trade Commission,
Appellee

BEFORE: Edwards, Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing, filed February 12, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX C

ORDER DENYING PRELIMINARY INJUNCTION OCTOBER 17, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UKIAH ADVENTIST HOSPITAL, *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 91-2320 (SSH)
FEDERAL TRADE COMMISSION, Defendant.	)	

MEMORANDUM ORDER

Before the Court are plaintiffs' motion for a preliminary injunction and defendant's motion to transfer the case or, in the alternative, to dismiss. Because the Court finds that it lacks jurisdiction, it does not reach the merits of plaintiffs' motion. Therefore, the Court grants the motion to transfer the case to the United States Court of Appeals for the Ninth Circuit.

Plaintiffs, Ukiah Adventist Hospital, Ukiah Valley Medical Center (Ukiah Valley), and Adventist Health System/West (AHS/West), seek an injunction to enjoin the Federal Trade Commission (FTC) from proceeding with its administrative complaint against Ukiah Valley and AHS/West. The FTC complaint challenges Ukiah Valley's acquisition of substantially all the assets of Ukiah General Hospital. While the Court is sympathetic to plaintiffs' position, the Court lacks jurisdiction over the merits of the controversy.

Plaintiffs seek relief from the FTC's ruling that it has jurisdiction over not-for-profit entities such as plaintiffs. The Commission's ruling overturned an Administrative Law Judge's (ALJ) decision finding no FTC jurisdiction. In conjunction with

its reversal, the FTC remanded the case to the ALJ for a hearing on the merits of the FTC complaint.

Under the law of this Circuit, a district court is without jurisdiction to hear claims seeking relief from agency action if final review of the agency's action is vested exclusively in the circuit courts. *See Telecommunications Research & Action v. FCC*, 750 F.2d 70, 74-79 (1984) (*TRAC*). This case falls squarely under the holding in *TRAC*. First, review of the agency's ultimate ruling is vested exclusively in the court of appeals. *See* 15 U.S.C. § 21(c), (d) (1973 & Supp. 1990). This exclusivity "strips" this Court of original jurisdiction. *TRAC*, 750 F.2d at 77. Second, any order issued by this Court, particularly a finding for plaintiffs, would be likely to "affect the Circuit Court's future jurisdiction." *Id.* at 75. Finally, the Court does not find that this case is one of the narrow exceptions to *TRAC* in which a district court has jurisdiction. *See id.* at 78. This Court's ruling will not foreclose all judicial review -- plaintiffs still have the possibility of review by the Ninth Circuit, either now or following a potentially adverse final ruling at the administrative level.

Therefore, after considering the motions, the oppositions thereto, and the oral arguments made to the Court, the Court transfers this case pursuant to 28 U.S.C. § 1631 (1991) to the Ninth Circuit. Thus, it hereby is

ORDERED, that the plaintiffs' motion for a preliminary injunction is denied. It hereby further is

ORDERED that the defendant's motion to transfer is granted. It hereby further is

ORDERED, that the Clerk of this Court shall take the steps necessary to accomplish the transfer of this case to the United States Court of Appeals for the Ninth Circuit.

SO ORDERED.

/s/
Stanley S. Harris
United States District Judge

Date: Oct. 17, 1991

APPENDIX D

ORDER OF ADMINISTRATIVE LAW JUDGE PARKER
FEBRUARY 8, 1990

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of:	)	
	)	
ADVENTIST HEALTH	)	
SYSTEM/WEST,	)	
a corporation,	)	
	)	
and	)	Docket No. 9234
	)	
UKIAH ADVENTIST	)	
HOSPITAL,	)	
a corporation,	)	
	)	

ORDER RULING ON RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

Respondents have moved to dismiss this proceeding, claiming that (1) the FTC lacks jurisdiction over them under Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21 and that (2) their activities in or affecting interstate commerce are insubstantial. Respondents also ask me to stay further proceedings pending a final decision on the jurisdictional issue.

Section 7 of the Clayton Act states:

> . . . no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no

> person *subject to the jurisdiction of the Federal Trade Commission* shall acquire the whole or any part of the assets of another person also engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly (emphasis added).

Respondents claim that Section 7 does not confer jurisdiction over the asset acquisition challenged by the Commission because it does not involve the acquisition of "stock or other share capital" since not-for-profit entities like respondents cannot by law, issue stock or other share capital, Cal. [Corp.] Code § 5410 (Deering 1988), and because this asset acquisition is not "subject to the jurisdiction of the Federal Trade Commission . . . ." under Section 5 of the FTC Act, 15 U.S.C. § 45. *See Community Blood Bank of the Kansas City Area, Inc.*, 405 F.2d 1011, 1020-22 (8th Cir. 1969).

Complaint counsel answer that the Commission has jurisdiction over respondents under the stock acquisition and asset acquisition clauses of Section 7(1) because the challenged transaction is tantamount to a stock acquisition or merger and (2) because, even if the transaction is a "pure" asset acquisition, it is "subject to the jurisdiction of the Federal Trade Commission" since Commission jurisdiction is granted by Section 11 of the Clayton Act.

II. COMMISSION JURISDICTION OVER AN ASSET ACQUISITION THAT IS TANTAMOUNT TO A MERGER

If the challenged transaction was not a "pure" acquisition of assets but was tantamount to a merger, complaint counsel argue that the Commission may challenge it under the stock acquisition clause of Section 7, citing *United States v. Rockford Memorial Hospital*, 717 F. Supp. 1251 (N.D. Ill. 1989), *appeal pending*, No. 89-1900 (7th Cir.), which upheld a government Section 7

challenge to a not-for-profit hospital consolidation. In this case, the court found that the first clause of Section 7[1] applies to transactions in which there is a "combining of economic power" of the acquiring and acquired entities, regardless of the form of the transaction.

The court's decision was based on *United States v. Philadelphia National Bank*, 374 U.S. 321, 344 (1963) and *United States v. Chelsea Savings Bank*, 300 F. Supp. 721, 725 (D. Conn. 1969), in which the court said:

> There is little question that the Supreme Court was primarily concerned with the substantive effect of a merger in consolidating the economic power of two corporations, rather than with the procedure through which the consolidation of power was effected. *Rockford Memorial*, 717 F. Supp. at 1256.

The court held that since the challenged consolidation was "clearly a merger, not a pure asset acquisition, . . . § 7 of the Clayton Act reaches non-stock mergers accomplished by persons not under the jurisdiction of the FTC."

The court came to this conclusion after considering whether the resulting corporation, after the acquisition, "inherits the program, services, management, rights, liabilities, obligation and abilities of Swedish American Corporation and Rockford Memorial Hospital." *Rockford Memorial*, 711 F. Supp. at 1258.

The complaint alleges in paragraph 20 that the challenged acquisition is "tantamount in its effects to a merger" and complaint counsel should be given the opportunity to prove this claim. *See Philadelphia National Bank*, 374 U.S. at 344, n. 22.

> . . . if such an exchange [of stock for assets] (or other clearly evasive transaction) were tantamount in its effects to a merger, the exchange would not be an 'assets' acquisition

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[1] ". . . no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . ."

within the meaning of §7 but would be treated as a transaction subject to that section.

Thus, pending discovery and trial on this issue, I will defer ruling on whether the Commission has jurisdiction over the challenged transaction under paragraph 20 of the complaint.

III. COMMISSION JURISDICTION OVER PURE ASSET ACQUISITIONS BY NOT-FOR-PROFIT CORPORATIONS

The Commission apparently did not challenge this transaction under Section 5 of the FTC Act because of the decision in *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1020-22 (8th Cir. 1969) where the issue was whether the language of Section 4 of the FTC Act, 15 U.S.C. § 44, which defines the word "corporations"[2] should be construed to include not-for-profit corporations. The court held:

> . . . under § 4 the Commission lacks jurisdiction over nonprofit corporation without shares of capital, which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members . . . . *Id.* at 1022.

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[2] Section 5(a)(2) of the FTC Act empowers the Commission to "prevent persons, partnerships, or corporations" from using unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Section 4 states:

> "Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

The Commission's failure to charge respondents under Section 5 of the FTC Act (which it now routinely does in Section 7 cases) suggests that it considered respondents as not-for-profit corporations not subject to its jurisdiction under Section 5.

Thus, if the FTC Act is the only source of Commission jurisdiction over pure asset acquisitions, the Commission does not have the power to challenge the present transaction.

Complaint counsel claim, however, that the Commission has Section 7 jurisdiction over an asset acquisition by a not-for-profit corporation by virtue of the following language in Section 11(a) of the Clayton Act:

> Authority to enforce compliance with sections 13, 14, 18 [Section 7], and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . . .

On the other hand, respondents claim that "by its express terms" Section 7 does not authorize Commission jurisdiction over them and that their argument is directly supported by several

cases[3] and its validity is suggested by rulings in others.[4] However, two of these cases may be seen as supporting complaint counsel's claim, for *Community Blood Bank* seems to acknowledge Sherman and Clayton Act jurisdiction over not-for-profit corporations,[5] while the thrust of *Philadelphia National Bank* is, arguably, that Congress intended that the Clayton Act cover all mergers and acquisitions:

> In other words, Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamation, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. 374 U.S. at 342.

On the other hand, the court in *Rockford Memorial*, 717 F. Supp. at 1257 stated that, while the FTC's jurisdiction was not an issue, "all parties agree that the FTC has no jurisdiction over the defendants;" and, in *United States v. Carilion Health Systems*, Civ. No. 87-0249-R (W.D. Va. Sept. 30, 1988), the court held that the FTC lacked jurisdiction over asset acquisitions by not-for-profit entities. However, the Fourth Circuit, in an unpublished decision, explicitly declined to address the lower court's analysis. *United*

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[3] *United States v. Carilion Health System*, No. 88-0249-R (W.D. Va. Sept. 30, 1988); *United States v. Carilion Health System*, 707 F. Supp. 840 (W.D. Va. 1989), *aff'd*, No. 89-2625 slip op. (4th Cir. Nov. 29, 1989); *Rockford Memorial, supra*.

[4] *Community Blood Bank, supra*, 405 F.2d at 1011; *United States v. Philadelphia National Bank*, 374 U.S. 321, 344 (1963); *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

[5] The court noted that these acts:

> . . . not only make no distinction between business and nonprofit corporations as does the FTC Act, but they contain no language whatsoever that would limit jurisdiction to particular types of corporations. 405 F.2d at 1018.

States v. Carilion Health Systems, No. 89-2625 (4th Cir. Nov. 29, 1989), slip op. at n.1.

Thus, the only case which has directly addressed the issue supports respondent's claim. None of the other cases are directly on point and suggest, on the one hand, that complaint counsel are correct (*Community Blood Bank, Philadelphia National Bank*) or that respondents are right: *Hospital Corp. of America*, 807 F.2d at 1381, 1390 ("There is a possible gap in the FTC's jurisdiction over acquisitions involving nonprofit corporations . . . ."); *Rockford Memorial, supra*.

Complaint counsel defend their position by referring to principles of statutory interpretation. *i.e.*, that "all sections of a single statute should be presumed to have been drafted by reference to one another"[6] rather than to another statute, and they also point to the fact that other statutes giving the FTC particular enforcement powers grant Commission jurisdiction at the same time. If that is the case, they argue, one may conclude that Congress intended the same result in the Clayton Act, that is, that Section 11 grants Clayton Act jurisdiction to the Commission.

It is also true that when Congress passed the Robinson-Patman Act, which amended Section 2 of the Clayton Act, it explicitly exempted not-for-profit corporations from its coverage, but I do not believe that I can infer from this any Congressional intent with respect to other sections of the Clayton Act. *See Philadelphia National Bank*, 374 U.S. at 348-49.

Because the cases cited by the parties are not conclusive and complaint counsel's exercise in inferring congressional intent is not convincing, the only way the jurisdictional issue can be answered is by analyzing the language of Sections 7 and 11. Respondents' analysis convinces me that their argument has merit.

Respondents point out that since Section 11 confers authority on the FTC to enforce compliance with Section 7 by "the persons . . . subject thereto," one must look to Section 7 to determine who those persons are, and Section 7 states that those persons are ones

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[6] *Haffner v. United States*, 585 F. Supp. 354, 358 (N.D. Ill. 1984), *modified*, 757 F.2d 920 (7th Cir. 1985).

"who are subject to the jurisdiction" of the FTC. Respondents argue, and I agree, that it is not reasonable to refer once again to Section 11 to determine who those persons are. It seems to me more reasonable to conclude that the words "subject to the jurisdiction of" in Section 7 require reference to Section 5 of the FTC Act to determine Commission jurisdiction over pure asset acquisitions, and the Commission does not claim Section 5 jurisdiction over respondents.

Thus, while there is no definitive answer to the question posed by respondents in their motion, I find that complaint counsel have not met their burden of proving that the Commission has jurisdiction over the challenged transaction under the asset acquisition clause of Section 7 of the Clayton Act. *See Community Blood Bank*, 405 F.2d at 1015: ". . . if the jurisdiction of the Commission is challenged, it bears the burden of establishing its jurisdiction."

I will not stay these proceedings pending a final determination on the jurisdiction issues.

IV. THE COMMERCE QUESTION

Respondents argue that, as a matter of law, their activities have an insubstantial effect on commerce and that the Commission therefore lacks jurisdiction over the challenged transaction, citing *Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1123 (1989). However, while the court affirmed the District Court's summary judgment dismissal, it confirmed complaint counsel's contention -- *i.e.*, that "whether a hospital's activities sufficiently affect interstate commerce is a highly fact based question." *Id.* at 765.

The record at this stage contains no facts upon which any judgment as to the commerce question can be made. I will therefore defer ruling on this issue until the record contains a factual basis for such a decision. Therefore,

IT IS ORDERED that respondents' motion to dismiss be, and it hereby is, granted on the issue of Commission jurisdiction over a

"pure" asset acquisition. Rulings on the interstate commerce question and whether the challenged transaction is tantamount to a merger, and thus subject to Commission jurisdiction, will be deferred until the factual record on these issues is complete.

IT IS FURTHER ORDERED that respondents shall file their nonbinding statement within five days of receipt of this order.

/s/
Lewis F. Parker
Administrative Law Judge

DATED: February 8, 1989

APPENDIX E

INITIAL DECISION OF JUDGE PARKER
AUGUST 2, 1990

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	
ADVENTIST HEALTH SYSTEM/WEST, a corporation,	
and	DOCKET NO. 9234
UKIAH ADVENTIST HOSPITAL, a corporation,	

INITIAL DECISION

By Lewis F. Parker, Administrative Law Judge

I. INTRODUCTION

The Commission issued its complaint in this case on November 7, 1989 charging that Adventist Health System/West ("AHS/West") and Ukiah Adventist Hospital ("Ukiah Adventist") had acquired substantially all of the assets of Ukiah Hospital Corporation ("UHC"), including Ukiah General Hospital ("Ukiah General") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

Respondents filed their answer, denying that AHS/West and Ukiah Adventist are subject to the jurisdiction of the Commission

pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. § 21 (Answer, ¶¶ 2, 4).

On February 8, 1990, I issued an order deciding that the Commission did not have Section 7 jurisdiction over respondents under its assets acquisition clause and I granted respondents' motion to dismiss the complaint insofar as it challenged the transaction as a "pure" assets acquisition.

I did not dismiss the complaint *in toto* since it also claims jurisdiction over respondents because the challenged transaction was "tantamount to its effects to a merger" (Complaint, ¶ 20). I deferred ruling on this issue until the factual record was complete. The parties have now filed stipulations of fact and have moved for summary decision on this issue. The following findings of fact adopt those stipulations and take into account the legal arguments made in the parties' motions.

II. FINDINGS OF FACT

A. The Respondents

1. Respondent AHS/West is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business in Roseville, California (Answer, ¶ 2).[1]

2. AHS/West is recognized as exempt from federal income taxation pursuant to Section 501(a) of the Internal Revenue Code of 1986, as amended ("Code"), as an organization described in Code Section 501(c)(3).

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[1] The parties disagree on the identity of the acquiring person or persons. Respondents believe that the sole acquiring person was Ukiah Adventist, and that AHS/West served only as the guarantor for the acquisition. Complaint counsel believe that AHS/West was also an acquiring person through its control of Ukiah Adventist. Accordingly, the term "the buyer" will be used herein to refer to the acquiring person(s), and nothing in these findings should be construed as waiving any party's position with regard to the identity of the acquiring person(s).

3. Respondent Ukiah Adventist doing business as Ukiah Valley Medical Center ("Ukiah Valley") since August, 1989, is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 275 Hospital Drive, Ukiah, California (Answer, ¶ 4).

4. Ukiah Adventist is recognized as exempt from federal income taxation pursuant to Section 501(a) of the Internal Revenue Code of 1986, as amended ("Code") as an organization described in Code Section 501(c)(3).

5. The members of Ukiah Adventist, for purposes of California non-profit religious corporation law, consist of those individuals serving as the Board of Directors of respondent AHS/West. Ukiah Adventist's members elect the majority of the Board of Directors of Ukiah Adventist. Through this affiliation, the individuals serving as the Board Directors of AHS/West have certain controls over Ukiah Adventist, which include their rights as members in accordance with Ukiah Adventist's articles of incorporation and by-laws and California non-profit religious corporation law (Answer, ¶ 5).

B. The Acquisition

6. By an agreement dated July 29, 1988, entitled "Asset Purchase Agreement -- Ukiah Hospital Corporation" ("asset purchase agreement"), the buyer acquired substantially all of the assets of UHC that consisted of and were used in the operation of Ukiah General in exchange for $5.6 million in cash, $326,079 for inventories and prepaids accepted by the buyer, and the assumption of certain specific liabilities of UHC (Answer, ¶ 10).

7. Pursuant to Section 1.1 of the asset purchase agreement, the buyer acquired the following assets of UHC:

(a) Real Estate. The land owned by UHC situated in Mendocino County, California, more particularly described at Exhibit 1.1(1) to the asset purchase agreement;

(b) Real Estate Improvements. All buildings, structures, fixtures and improvements then or thereafter erected or located on the real estate;

(c) Appurtenances. All tenements, hereditaments, rights, privileges, interests, easements and appurtenances then or thereafter belonging to or in any way benefitting the real estate or real estate improvements;

(d) Inventories. All inventories of every kind and nature whatsoever of a quality and quantity usable in the ordinary course of business of Ukiah General (specifically including, but not limited to, all pharmacy supplies, medical supplies, office supplies, equipment and maintenance supplies, other supplies and foodstuffs and specifically excluding all supplies, promotional materials, billing forms, stationery and other paper products which identify UHC as the owner or operator of Ukiah General) owned by UHC or in UHC's possession on the date of the asset purchase agreement or thereafter acquired, and relating to Ukiah General;

(e) Tangible Personal Property. All machinery, building materials, appliances, apparatus, motor vehicles, furniture, furnishings, fixtures, tools, instruments, parts and other tangible personal property of every kind and nature whatsoever owned by UHC on the date of the asset purchase agreement, other than the inventories, and all rights, titles and interests of UHC in any tangible personal property being purchased on contract or being leased by UHC on the date of the asset purchase agreement or thereafter including but not limited to all those items specifically listed in Exhibit 1.1(5);

(f) Intangible Personal Property. All chattel paper, options to lease or purchase realty and/or personalty, contracts rights, documents, instruments, general intangibles, medical records, administrative records, other books and records relating to Ukiah General, all rights of UHC and any affiliate of UHC to the name "Ukiah General Hospital," plans and specifications for all real estate improve-

ments (including but not limited to "as builts"), lien waivers, surety agreements, surety and performance bonds, warranties, guaranties, prepaid expenses, deposits, conditions, covenants, commitments, purchase orders, judgments, causes of action and choses in action relating to the design, development, construction or condition of the assets, contracts and agreements at Exhibit 1.1(6) to be assumed by the buyer, all other intangible personal property of every kind or nature whatsoever owned by UHC on the date of the asset purchase agreement or thereafter acquired and relating to Ukiah General, excepting the excluded assets in Section 1.2 of the asset purchase agreement, contracts and agreements not assumed by the buyer and other assets expressly excluded in the asset purchase agreement; and

(g) Authorizations. All transferable licenses, permits, certificates and franchises necessary to operate and conduct the business of Ukiah General and, to the extent transferable, all waivers of any requirements pertaining to such licenses, permits, certificates and franchises, all as described in Exhibit 1.1(7).

8. Pursuant to Section 1.2 of the asset purchase agreement, the following assets were excluded from the transaction: any cash, cash equivalents, service marks, corporate names (including but not limited to "Hospital Corporation of America," "HealthTrust," and "HealthTrust, Inc. - The Hospital Company" or any variation or combination thereof), patient accounts receivable, notes receivable, any and all claims of UHC against the United States Government under the Medicare program or the State of California under the MediCal (Medicaid) program or of any fiscal intermediary payable to UHC arising out of hospital operations through the closing date, including any claims generated by the sale of the assets, other receivables, intercompany accounts and computer software systems and programs of UHC or Hospital Corporation of America.

9. Through the transaction accomplished pursuant to the asset purchase agreement, the buyer acquired substantially all of the assets of UHC.

10. Pursuant to Section 4.16 of the asset purchase agreement, UHC certified that, except as set forth in Exhibit 4.16 thereto, as of the date on which it executed the asset purchase agreement, neither it nor HealthTrust, nor any subsidiary or affiliate of either, nor, to the best of UHC's knowledge, Hospital Corporation of America, had any direct or indirect interest in any health care related facility, program, franchise, contract or business of any kind or nature whatsoever located in or doing any business in Mendocino County or Lake County, California.

11. Pursuant to Section 5.4 of the asset purchase agreement, the buyer warranted and represented that it had made applications to the appropriate governmental authorities for the transfer of all authorizations and the grant of all other requisite governmental and regulatory approvals necessary to own and operate the acquired assets as part of a general acute care hospital.

12. The buyer did not acquire any stock or share capital of UHC or of any entity in connection with the purchase of substantially all of the assets of UHC.

13. Pursuant to Section 2.2(1) of the asset purchase agreement, the buyer assumed only certain specifically identified liabilities.

14. Pursuant to Section 2.2(2) of the asset purchase agreement, the buyer expressly disclaimed assumption of the following liabilities and obligations of UHC:

(a) any and all obligations of UHC accruing through the closing date under the assumed agreements;

(b) any and all claims of the United States Government under the Medicare program or of the State of California under the MediCal (Medicaid) program or of any fiscal intermediary payable by UHC arising out of hospital operations through the closing date, including any claims for recapture of depreciation generated by the sale of the assets;

(c) federal and state income taxes, if any, payable by UHC with respect to Ukiah General through the closing;

(d) franchise taxes payable by UHC through the closing;

(e) sales and other taxes (including, without limitation, use taxes) payable by UHC with respect to the business operations of Ukiah General through the closing;

(f) any and all liabilities of UHC relating to Ukiah General for acts or omissions, including medical malpractice, arising prior to or on the closing date;

(g) any and all obligations, and responsibilities under all laws (as defined in Section 4.12 of the asset purchase agreement) and agreements due or owed to or concerning any of UHC's hospital employees;

(h) any other debt, obligation, or liability not specifically and expressly included in the assumed liabilities, whether or not such debt, obligation or liability is disclosed in any financial statement (and notes thereto) or any other document which was or may have been delivered by or on behalf of UHC to the buyer.

15. The acquisition of assets described in the asset purchase agreement involved no change in the corporate structure or either Ukiah Adventist or UHC. According to the Office of the Secretary of State for the State of California, UHC is currently an existing corporation in good standing under California law.

16. The asset purchase agreement does not contain any language requiring that UHC be dissolved or that it refrain from competing in the relevant market.

17. Pursuant to the asset purchase agreement, the buyer did not acquire the management personnel of UHC.

18. Pursuant to the asset purchase agreement, UHC did not acquire any voice in the decisions of the buyer, and the buyer did not acquire any voice in the decisions of UHC.

19. The asset purchase agreement did not provide for the assumption by the buyer of any employment contracts between UHC and UHC's employees. Pursuant to Section 9.11 of the asset purchase agreement, UHC terminated the non-management employees of Ukiah General prior to closing. After the closing, Ukiah Adventist hired a majority of individuals that were formerly non-management employees of Ukiah General. The former Ukiah General employees that were hired by Ukiah Adventist were

required to formally apply and interview for positions with Ukiah Adventist. These hirings were not a condition in the asset purchase agreement.

20. The buyer assumed or otherwise acquired only those contracts and agreements of UHC which it specifically agreed to assume or acquire, which contracts and agreements are described in Exhibit 1.1(6) to the asset purchase agreement. With the exception of those specifically identified contracts and agreements, the buyer either had its own contracts or renegotiated new contracts.

21. UHC's shareholders or affiliated entities obtained no interest in the buyer and retained no interest in the acquired assets.

22. The buyer did not acquire all of the rights, powers, liabilities, fiduciary rights and obligations of UHC.

23. California corporate law requires that non-profit corporations involved in a merger file appropriate documentation with the State of California. Calif. Corp. Code §§6010-6014 (Deering 1990). The buyer did not file documentation with the State of California that would have reported a merger.

III. CONCLUSIONS OF LAW

Assuming the necessary adverse competitive effects, Section 7 of the Clayton Act outlaws both stock and assets acquisitions. However, the coverage of the assets acquisition clause of Section 7 is limited to persons subject to the jurisdiction of the Federal Trade Commission.[2]

In a prior order in this case (Order Ruling on Respondents' Motion to Dismiss, (Feb. 8. 1990)), I agreed with respondents that one must look to Section 5 of the FTC Act to determine the Commission's Clayton Act jurisdiction rather than to Section 11 of the Clayton Act as complaint counsel argue. Because the Commission does not have FTC Act jurisdiction over not-for-profit entities

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[2] "[N]o person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person . . . ."

like respondents,[3] I held that it did not have Clayton Act jurisdiction over the challenged assets acquisition.

Since the challenged transaction was not a stock acquisition (Finding (F.) 12) -- the only other explicit Section 7 jurisdictional alternative -- my decision would have required dismissal of this case except for the allegation in paragraph 20 of the complaint that the assets acquisition was "tantamount in its effects to a merger," language which is taken from the Supreme Court's decision in *Philadelphia National Bank*, 374 U.S. 321 (1963), where it held:

> [I]f such an exchange [of stock for assets] (or other clearly evasive transaction) were tantamount in its effects to a merger, the exchange would not be an 'assets' acquisition within the meaning of § 7 but would be treated as a transaction subject to that section.

Id. at 344, n.22.

The Supreme Court recognized that Section 7 jurisdiction did not attach to assets acquisitions by persons not subject to FTC jurisdiction, but it held that this exception:

> excludes from the coverage of §7 only assets acquisitions by such corporations when not accomplished by merger.

374 U.S. at 342.

Two district court decisions have followed the Supreme Court's approach to assets acquisitions accomplished by merger.

In *United States v. Chelsea Savings Bank*, 300 F. Supp. 721 (D. Conn. 1965), the court held that the consolidation of non-stock corporations which combined the economic power of two banks, Chelsea and Dime, was tantamount in its effects to a merger because it resulted in the formation of a new bank (The Chelsea-Dime Savings Bank) whose affairs would be managed by a single board of directors. *Id.* at 723-24.

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[3] *See Community Blood Bank of the Kansas City Area*, 405 F.2d 1011, 1020-22 (8th Cir.).

In *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989), the district court decided that the government had Section 7 jurisdiction over a non-stock consolidation of not-for-profit hospitals.

The court recognized that "Section 7 does not reach non-merger assets acquisitions accomplished by persons not under the FTC's jurisdiction," *Id.* at 1254, but found that the transaction challenged by the government was "clearly a merger, not a pure assets acquisition" because:

> The two existing corporations are subsumed into a new resulting entity. The resulting corporation inherits the program, services, management, rights, liabilities, obligations and abilities of Swedish American Corporation and Rockford Memorial Corporation. There will be continuity in management and personnel after the consolidation, since representation [sic] of both corporations will oversee the new resulting corporation.

Id. at 1258.

The court referred to the following language in *Philadelphia National Bank*, 374 U.S. at 336 n.13, as the test for distinguishing between a sale of assets and a typical merger:

> A merger necessarily involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's properties, with no change in corporate structure and no change in stockholder interests.[4]

It is apparent that the present assets acquisition differs from those in *Chelsea* and *Rockford Memorial*. In those cases, the

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[4] While this language is a quotation from the government's brief, I believe that the Court considered it persuasive. *See also* 15 *Fletcher Cyclopedia Corporations* § 7041 (Perm. ed. 1983).

acquisitions resulted in the disappearance of the acquired entities through consolidation whereas here, although substantially all of the assets of UHC were acquired (F. 9), there is no dispute that it still exists (F. 15), that the buyer did not file documents with the State of California reporting a merger (F. 23), that the buyer did not acquire UHC's management personnel (F. 17) or its employment contracts (F. 19), that the buyer did not acquire all of UHC's assets, rights, powers, liabilities, or obligations (F. 8, 14, 20, 22), and that neither party obtained any voice in decisions made by the other (F. 18).

The district court's decision in *Rockford* was overturned by the Seventh Circuit, *United States v. Rockford Memorial Corporation*, 898 F.2d 1278 (7th Cir. 1990), and the opinion by Judge Posner in that case suggests that the Supreme Court's decision in *Philadelphia National Bank* should be narrowly construed:

> The approach to statutory interpretation that informs *Philadelphia National Bank* is controversial, but it is neither indefensible nor irrelevant to the interpretive question in the present case. The approach, premised on recognition that legislative draftsmanship is often a rushed and clumsy process, deficient in foresight, tries to carry out the purposes of the statute insofar as these can be inferred, even if the result is a wide departure from literal meaning. But whatever its merits, it is not an approach in vogue in the Supreme Court at the moment and we hesitate to push it further than it was pushed in *Philadelphia National Bank*.

Id. at 1281.

In *Rockford*, the main reason for rejection of the lower court's decision was the fact that the acquired company had no stock or share capital. UHC is a for-profit stock corporation, but the issue before me is whether the Commission has jurisdiction over the acquisition by the respondents, AHS/West and Ukiah Adventist, which are not-for-profit corporations. In deciding that issue, I consider Judge Posner's reluctance to push the rationale of

Philadelphia National Bank to extremes a persuasive approach to the question before me.

Complaint counsel's jurisdictional argument is an extreme one, in my view. There is no doubt, as complaint counsel argue, that assets acquisitions can have the same competitive effects as stock acquisitions -- indeed, that is why Congress amended the Clayton Act, *Philadelphia National Bank*, 374 U.S. at 340-41 -- but the statute has different jurisdictional tests for stock and assets acquisitions, a distinction which complaint counsel ignore by asserting that the "nominal form" of any assets acquisition can be ignored (Complaint Counsel's Motion for Partial Summary Decision, p. 7). I agree with respondents that this theory "proposes a standard whereby all transactions can be reached by the stock clause of Section 7" (Respondents' Motion for Summary Decision, p. 13).

That is not what *Philadelphia National Bank* held; rather, it looked to the form of the assets acquisition in question and found jurisdiction only because it was "accomplished by merger," 374 U.S. at 342, as did the district courts in *Chelsea Savings* and *Rockford Memorial*, and I find that in this case the assets acquisition challenged by the Commission was not accomplished by merger.

IV. ORDER

Therefore, since the Commission does not have Section 7 Clayton Act jurisdiction over respondents,

IT IS ORDERED that the complaint be, and it hereby is, dismissed.

/s/
Lewis F. Parker
Administrative Law Judge

DATED: August 2, 1990

APPENDIX F

ORDER AND OPINION OF THE FEDERAL TRADE COMMISSION AUGUST 2, 1991

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

JANET D. STEIGER, CHAIRMAN
MARY L. AZCUENAGA
DEBORAH K. OWEN
ROSCOE B. STAREK, III
DENNIS A. YAO

In the Matter of	)	
	)	
ADVENTIST HEALTH SYSTEM/WEST,	)	
a corporation; and	)	Docket No. 9234
	)	
UKIAH ADVENTIST HOSPITAL,	)	
a corporation	)	
	)	

ORDER

This matter has been heard by the Commission upon the appeal from the initial decision of counsel supporting the complaint, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to reverse the initial decision and remand the matter for further proceedings. Therefore,

IT IS ORDERED, That the initial decision of the Administrative Law Judge is reversed and the matter remanded for further

proceedings in accordance with this order and accompanying opinion.

By the Commission.*

/s/
Donald S. Clark
Secretary

SEAL:

ISSUED: August 2, 1991

ATTACHMENTS:
Opinion of the Commission
Concurring Statement of Chairman Steiger

* Prior to leaving the Commission, Commissioner Strenio registered a vote in he affirmative for the Order and Opinion of the Commission in this matter. Commissioner Yao did not register a vote in this matter.

OPINION OF THE COMMISSION[1]

By Strenio, Commissioner:

The issue presented here is whether the Administrative Law Judge ("ALJ") erred when he granted Adventist Health System/West's ("AHS/West") and Ukiah Adventist Hospital's ("Ukiah Adventist") motion to dismiss and motion for summary decision on the ground that respondents' acquisition of substantially all the assets of Ukiah General Hospital ("UGH") did not satisfy the jurisdictional requirements of the Clayton Act. We find that the ALJ erred when he granted the motion to dismiss. His order is reversed and the matter remanded for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

On November 7, 1989, the Federal Trade Commission ("Commission" or "FTC") issued a complaint alleging that respondents Ukiah Adventist and AHS/West, two nonprofit religious corporations, violated Section 7 of the Clayton Act, 15 U.S.C. § 18, when they acquired substantially all the assets of UGH.[2] Complaint, ¶¶ 2, 4, 10, 20. The complaint sets forth two

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[1] The following abbreviations are used in this opinion:

STIP. - Stipulations (June 19, 1990) (in camera).
CCAB - Appeal Brief of Counsel Supporting the Complaint (Sept. 10, 1990).
RAB - Brief of Appellees Adventist Health System/West and Ukiah Adventist Hospital (Oct. 11, 1990).
CCRB - Reply Brief of Counsel Supporting the Complaint (Oct. 23, 1990).
TOA - Official Transcript of the Oral Argument before the Federal Trade Commission (Dec. 18, 1990).

[2] The complaint alleges that the acquisition was made by both Ukiah Adventist and AHS/West, through its control of, and affiliation with, Ukiah Adventist. Complaint, ¶ 12. Respondents disagree and assert that the acquisition was made solely by Ukiah Adventist and that AHS/West "served only as the guarantor for

(continued...)

separate and distinct bases for the Commission's subject matter jurisdiction. The first is that Section 11 of the Clayton Act, 15 U.S.C. § 21, provides the FTC with jurisdiction to enforce Section 7 of the Clayton Act over assets acquisitions by not-for-profit corporations. *See* Complaint, ¶¶ 2, 4, 20. The second is that this assets acquisition was "tantamount in its effects to a merger" and therefore subject to the stock or share capital provision of Section 7 of the Clayton Act. Complaint, ¶ 20.[3]

Respondents' answer to the complaint denies most of the allegations and raises three affirmative defenses. Only one of those defenses, that the FTC lacks Section 7 jurisdiction over this acquisition, is relevant to this appeal.[4]

Respondents filed a motion to dismiss the complaint on January 19, 1990. The motion sought dismissal on the grounds that the FTC lacks jurisdiction under either Section 7 or Section 11 of the Clayton Act and that respondents' activities in or affecting interstate commerce are insubstantial. Respondents further requested that the ALJ stay further proceedings pending a final decision on the jurisdictional issue.[5]

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[2](...continued)
the acquisition." *See* STIP. at 1 n.1. Because both Ukiah Adventist and AHS/West are not-for-profit corporations, this issue has no bearing on the pending appeal.

[3] Of course, the complaint also alleges that "respondents have been and are now engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12." Complaint, ¶ 6.

[4] The two other affirmative defenses asserted by respondents are: (1) that the Commission lacks jurisdiction because of Ukiah Adventist's insubstantial effect on interstate commerce; and (2) that the combination of two inefficient hospitals' operations is in the best interest of health care consumers. Answer at 8-13 (Dec. 26, 1989). In light of the procedural posture of this case, neither of these two affirmative defenses is before us for review. Thus, we intimate no decision as to their merits and await further proceedings before deciding whether these defenses are meritorious.

[5] *See* Respondents' Motion to Dismiss (Jan. 19, 1990).

Complaint counsel opposed the motion to dismiss, arguing that: (1) the FTC has authority under Section 11(a) of the Clayton Act to enforce Section 7 of the Clayton Act against nonprofit hospitals; (2) respondents' acquisition is subject to antitrust scrutiny under Section 7 if it is found to be "tantamount in its effects to a merger"; (3) respondents have failed to show that, as a matter of law, the interstate commerce tests of Section 7 of the Clayton Act cannot be satisfied in this matter; and (4) respondents' request for a stay should be denied.[6]

On February 8, 1990, Chief Administrative Law Judge Lewis F. Parker, issued his Order Ruling on Respondents' Motion to Dismiss. In that Order, the ALJ granted respondents' motion to dismiss on the issue of Section 7's reach over a "pure" assets acquisition. He deferred rulings on the interstate commerce question and the issue of whether the challenged transaction is "tantamount in its effects to a merger" until the factual record on those issues could be completed. He also declined to stay the proceedings pending a final determination on the jurisdictional issue. Order Ruling on Respondents' Motion to Dismiss (Feb. 8, 1990).

Respondents then requested that the ALJ certify to the Commission the "tantamount in its effect to a merger" issue, the interstate commerce issue, and the question of whether the proceedings should be stayed pending a determination of these issues.[7] Complaint counsel opposed respondents' application[8] and filed its own request with the ALJ to file an application for review by the Commission of the portion of the ALJ's February 8, 1990, Order holding that the Commission lacks jurisdiction over the challenged

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[6] Complaint Counsel's Memorandum of Points and Authorities in Opposition to Respondents' Motion to Dismiss (Jan. 29, 1990).

[7] Application for Review of Ruling on Respondents' Motion to Dismiss (Feb. 13, 1990).

[8] Complaint Counsel's Opposition to Respondents' Application for Review (Feb. 26, 1990).

transaction under the assets acquisition clause of Section 7 of the Clayton Act.[9] On March 6, 1990, the ALJ issued his Order Denying Complaint Counsel's and Respondents' Requests for Permission to File Application for Review.[10]

After the Court of Appeals for the Seventh Circuit issued its decision in *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990), both complaint counsel and respondents filed motions for reconsideration with the ALJ.[11] The ALJ denied both motions.[12]

After the parties agreed to be bound to a stipulated record on the issue of whether the transaction was "tantamount in its effects to a merger," the parties filed cross-motions for summary decision.[13] On August 2, 1990, the ALJ issued his initial decision, in

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[9] Complaint Counsel's Request to File Application for Review of Order on Respondents' Motion to Dismiss (Feb. 23, 1990). Respondents replied to complaint counsel's February 23, 1990 request. *See* Respondents' Answer in Opposition to Complaint Counsel's Request to File Application for Review (March 6, 1990).

[10] On March 15, 1990, after the ALJ denied respondents' Application for Review of Ruling on Respondents' Motion to Dismiss, respondents filed Respondents' Request for a Writ of Mandamus to Compel Certification of a Controlling Question of Law or for Dismissal Due to the Lack of FTC Jurisdiction. Complaint counsel opposed that request. Complaint Counsel's Reply to Respondents' Request for Writ of Mandamus (March 22, 1990). The Commission never ruled on respondents' request.

[11] *See* Motion for Reconsideration (April 13, 1990) (complaint counsel's motion); Respondents' Motion for Reconsideration (April 25, 1990).

[12] *See* Order Denying Complaint Counsel's Motion for Reconsideration of Part III of Order Ruling on Respondents' Motion to Dismiss (April 26, 1990); Order Denying Respondents' Motion for Reconsideration (May 8, 1990).

[13] *See* Complaint Counsel's Motion for Partial Summary Decision (July 8, 1990); Respondents' Motion for Summary Decision (July 20, 1990). Apparently, complaint counsel's motion was "partial" because if it prevailed, other jurisdictional and substantive issues still would need to be resolved. On the other hand,

(continued...)

which he held that this assets acquisition was not tantamount in its effects to a merger and the Commission therefore cannot challenge it under Section 7 of the Clayton Act. The ALJ dismissed the complaint.

Counsel supporting the complaint appealed the ALJ's initial decision to the Commission.

II. ISSUES

The issues before the Commission are twofold. First, whether Section 7 of the Clayton Act reaches assets acquisitions by not-for-profit corporations by operation of Section 11 of the Clayton Act. Second, whether the purchase of assets that occurred in this transaction was "tantamount in its effects to a merger" and therefore subject to the stock or share capital provision of Section 7 of the Clayton Act. If the resolution of either of these two issues is in the affirmative, then the decision of the ALJ must be reversed and the matter remanded for further proceedings.

We will treat respondents' motion for summary decision as a renewed motion to dismiss and treat ALJ's grant of respondents' motion in the initial decision as a grant of a motion to dismiss. As such, the standard of review for both issues before the Commission is identical.

III. SECTION 7'S REACH OVER ASSETS ACQUISITION BY NOT-FOR-PROFIT CORPORATIONS

We begin with the premise that "[i]mmunity from the antitrust laws is not lightly implied." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963) (quoting *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962)). Our examination of the arguments and the relevant authorities has led us to the conclusion that Section 7 of the Clayton Act reaches

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[13](...continued)
if respondents prevailed, the complaint would be dismissed for lack of subject matter jurisdiction.

anticompetitive assets acquisitions by not-for-profit corporations, even if those corporations are not subject to the FTC's jurisdiction under the FTC Act. In other words, we find the Clayton Act to be a separate and distinct basis for the Commission's jurisdiction in nonprofit transactions such as this one.

The complaint in this case alleges that respondents are "persons" within the meaning of the Clayton Act and thereby subject to jurisdiction of those with enforcement authority under that Act. Section 1(a) of the Clayton Act defines "persons" to "include corporations and associations existing under or authorized by the laws of . . . any State." 15 U.S.C. § 12(a). Thus, the Clayton Act contains a broad definition of "persons" who are subject thereto and that definition makes no exception for nonprofit corporations.

While broadly defining the "persons" subject to the Clayton Act, Congress created certain exemptions from the Act's coverage in Section 6 of the Clayton Act, 15 U.S.C. § 17. Where Congress specifically exempts, interference of other exemptions is difficult to assert and sustain.

Congress clarified further the application of certain provisions of the Clayton Act as to nonprofit institutions when, in 1938, it enacted the Non-Profit Institutions Act, which amended the Robinson-Patman provisions of the Clayton Act, to exempt expressly certain nonprofit institutions from Robinson-Patman coverage. The amendment provides that nothing in the Robinson-Patman Act "shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." 15 U.S.C. § 13c. This amendment demonstrates that Congress has utilized its power to exclude not-for-profit entities, including hospitals, from the requirements of certain provisions of the Clayton Act through clear language, and accordingly not by implication.

Both parties claim support for their respective positions from the text of the statutes, the legislative histories and case law. These subjects are discussed below.

A. The Text of the Relevant Statutes.

The Commission's complaint refers to Section 11 of the Clayton Act as the basis for its jurisdiction. See Complaint ¶¶ 2, 4.[14] Section 11(a) provides as follows:

> Authority to enforce compliance with Sections 2, 3, 7 and 8 of [the Clayton] Act by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to Subtitle IV of Title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportations where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . . .

15 U.S.C. § 21(a). In this case, the complaint alleges that the acquisition in question violates Section 7 of the Clayton Act and jurisdiction to challenge the acquisition is based on Section 11. Section 7 provides in relevant part as follows:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person also engaged in commerce or in any activity affecting commerce, where in any line of commerce

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[14] The preamble to the complaint also states that the Commission "hereby issues its complaint, pursuant to the provisions of Section 11 of the Clayton Act, as amended, 15 U.S.C. § 21 . . . ."

> or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

Section 7 of the Clayton Act contains two distinct clauses by which acquisitions are measured. The first is known as the "stock acquisition clause" and the second is known as the "assets acquisition clause." While both clauses are germane to this appeal, only the assets acquisition clause is relevant to the not-for-profit corporation issue.[15] This is because the stock acquisition clause applies to all "persons" within the meaning of the Clayton Act and the assets acquisition clause applies only to "persons" who "are subject to the jurisdiction of the Federal Trade Commission."

The issue in this appeal is the meaning of the phrase "subject to the jurisdiction of the Federal Trade Commission." Complaint counsel argues that this "phrase refers to the Commission's jurisdiction under Section 11" of the Clayton Act. See, e.g., CCAB at 18. Respondents argue that this phrase refers to the Commission's jurisdiction under the FTC Act, and that the Commission therefore lacks jurisdiction because of the limited definition of "corporation" in Section 4 of the FTC Act. See, e.g., RAB at 13-14.

Respondents argue vigorously that complaint counsel's reading of the statutory provisions is incorrect and characterize complaint counsel's argument as follows: Complaint counsel relies upon Section 11 of the Clayton Act as the jurisdictional basis for this case. For alleged anticompetitive acquisitions such as this one, Section 11 refers to persons subject to Section 7 of the Clayton Act. Section 7's assets acquisition clause (the clause relied upon by complaint counsel for this part of its case) refers to persons "subject to the jurisdiction of the Federal Trade Commission." Complaint counsel then -- erroneously in respondents' view --

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[15] The stock acquisition clause is relevant to the "tantamount in its effects to a merger" issue which is discussed *infra* at page 34.

looks back to Section 11 of the Clayton Act to see if respondents are persons subject to the jurisdiction of the FTC.

Respondents have no quarrel with complaint counsel's use of Section 11 as the starting point, or the subsequent move to Section 7. They argue that from Section 7, we should proceed to Section 4 of the FTC Act instead of returning to Section 11 of the Clayton Act. To do otherwise, they assert, is to engage in circular reasoning.

However, this argument by respondents fails to recognize that complaint counsel's statutory analysis is not necessarily circular because it goes back from one paragraph of Section 11, then to Section 7, and then back to that same Section 11 paragraph. Instead, complaint counsel's statutory analysis begins with the initial portion of Section 11(a) of the Clayton Act,[16] then moves to the assets acquisition provision of Section 7,[17] and finally ends with the concluding portion of Section 11(a).[18] Referring to two provisions within the same paragraph at different points in the analysis does not constitute a fatal "circularity" problem as suggested by respondents.

If respondents' arguments were taken to their logical conclusion, the result would be that neither the FTC, the Department of Justice, the state attorneys general nor private parties would have

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[16] "Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . ." 15 U.S.C. §21(a)

[17] "[N]o person subject to the jurisdiction of the Federal Trade Commission shall acquire, directly or indirectly, the whole or any part of the assets of another person engaged in commerce . . . ." 15 U.S.C. §18.

[18] Jurisdiction to enforce, *inter alia*, Section 7 is conferred upon four specific regulatory agencies where applicable and "in the Federal Trade Commission where applicable to all other character of commerce...." 15 U.S.C. § 21(a). The four other specific regulatory agencies provided specific grants of jurisdiction in Section 11(a) of the Clayton Act are the: (1) Interstate Commerce Commission; (2) Federal Communications Commission; (3) Department of Transportation; and (4) Federal Reserve Board. *Id.*

authority to file suit under the Clayton Act to enjoin or otherwise redress plainly anticompetitive assets acquisitions by not-for-profit corporations.[19] Respondents' reasoning is that the Section 7 assets acquisition clause may be applied only to a "person subject to the jurisdiction of the Federal Trade Commission." If respondents are correct that this phrase refers to the FTC Act, and since Section 4 of the FTC Act expressly excludes most nonprofit corporations from its coverage, no one could challenge an anticompetitive assets acquisition under Section 7 of the Clayton Act if consummated by a corporation that is not "organized to carry on business for its own profit or that of its members."

Another statutory provision supplies additional guidance on how to interpret properly the phrase "subject to the jurisdiction of the Federal Trade Commission" from Section 7 of the Clayton Act. Section 11 of the FTC Act provides as follows:

> Nothing contained in [the Federal Trade Commission] Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the [Federal Trade Commission] Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

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[19] Indeed, as respondents' counsel asserted during the oral argument before the Commission, it is respondents' position that no one has jurisdiction under either the stock acquisition clause or the assets acquisition clause of Section 7 of the Clayton Act to pursue anticompetitive acquisitions made by not-for-profit corporations. *See* TOA at 28-32 (colloquy between Commissioner Owen and counsel for respondents as well as colloquy between Chairman Steiger and counsel for respondents); *id.* at 47-48 (colloquy between Commissioner Strenio and counsel for respondents).

We note that respondents' interpretation of Section 7 in this regard appears to run counter to the admonition of the Supreme Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 343 (1963): "It is unquestioned that the stock-acquisition provision of § 7 embraces every corporation engaged in commerce, including banks."

15 U.S.C. § 51. Section 4 of the FTC Act defines "Antitrust Acts" to include the Clayton Act. 15 U.S.C. § 44. The express language of Section 11 of the FTC Act, in turn, prohibits a construction of the FTC Act that would alter or modify the Clayton Act.[20]

Complaint counsel argues that respondents' approach of applying the FTC Act's narrower definition of corporations to Section 7 of the Clayton Act in effect impermissibly would construe the FTC Act in a manner that would alter or modify the Clayton Act. In light of the express language used in Section 11 of the FTC Act, we agree.

Respondents seek to apply the FTC Act's definition of "corporation" to limit the reach of Section 7. However, even though complaint counsel's appeal brief raised the Section 11 of the FTC Act issue (see CCAB at 19), respondents did not respond in their brief. During oral argument respondents appeared to take the position that Section 11 of the FTC Act applies only to the substantive scope of the other antitrust laws and not to the identities of those who may be subject to the jurisdiction of the other antitrust laws.[21] However, no support for respondents'

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[20] *See also Haffner v. United States*, 585 F. Supp. 354, 358 (N.D. Ill. 1984), *modified*, 757 F.2d 920 (7th Cir. 1985) ("[A]ll the sections of a single statute should be presumed to have been drafted with reference to one another; the whole statute is the context for construction of any of its individual sections.").

[21] At oral argument before the Commission, this issue was probed with respondents. *See* TOA at 38-41. During the oral argument the following colloquy ensued with respondents' counsel:

> COMMISSIONER STRENIO: But I am curious as to why it is that Section 11 of the FTC Act ought not to be given the effect that, on the face of it, it is apparently intended to have. At least, that is the argument.
>
> MR. CAMPBELL: I agree. I don't view restricting the applicability to the entities enumerated to be a restriction on the scope of the Act. I think that has to do with the substantive powers of the Act, and so I frankly view that as a non sequitur.

(continued...)

proposition is evident in the text of Section 11 of the FTC Act or in the cases construing that provision.[22]

Respondents point out that the Clayton Act and the FTC Act are to be read *in pari materia* and conclude that "Congress did not need to delineate an *exemption* for not-for-profits in Section 11 of the Clayton Act because not-for-profits were specifically *excluded* from the jurisdiction of the FTC." See RAB at 25 (emphasis in original). We agree with respondents that the two statutes are to be read *in pari materia*, but do not agree that this leads to respondents' conclusion.

Respondents contend that "the two statutes were intended to serve the same function -- to supplement the Sherman Act and prevent restraints of trade." *Id.* at 24. While the two statutes clearly are complementary, their language and legislative histories show that they serve different functions.

Congress created the Federal Trade Commission with two principal objectives. The first was to gather and publish information regarding the profitability and practices of major businesses.[23] The second was to define and curtail unfair business practices

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[21](...continued)

Id. at 41.

[22] *See United States v. Chas. Pfizer & Co.*, 205 F. Supp. 94, 96 (S.D.N.Y. 1962) (even though the facts underlying a subsequent Sherman Act prosecution were "in many respects identical" to a prior FTC complaint, Section 11 of the FTC Act was construed to permit simultaneous or successive prosecutions); *United States v. Cement Inst.*, 85 F. Supp. 344, 347 (D. Colo. 1949) ("It would seem the Federal Trade Commission Act was not designed to interfere with, or detract from the exercise of the authority and duty of the Attorney General to seek enforcement of the Sherman Act, as it especially provides that no order of the Commission, or judgment, shall in any wise relieve or absolve any person from liability under the anti-trust acts, which are defined as including the Sherman Act.").

[23] *See, e.g.*, H.R. Rep. No. 533, 63d Cong., 2d Sess., pt. 1, at 2-4 (1914) *reprinted in* 5 E. *Kintner, The Legislative History of the Federal Antitrust Laws* (continued...)

as such practices developed. The Clayton Act, on the other hand, contained no similar information gathering and reporting provisions and deemed unlawful certain broadly- defined practices.[24]

The different emphases of the two Acts support an inference that Congress was willing to tolerate some undefined unfair methods of competition by certain not-for-profit entities, but not those practices specifically condemned by the Clayton Act (such as unlawful tying arrangements, acquisitions and interlocking directorates). There is nothing illogical in denying the authority for the Commission to enforce the "unfairness" provisions in Section 5 of the FTC Act against certain not-for-profit corporations, but granting the authority under Section 11 of the Clayton Act for the Commission to enforce that statute's specific prohibitions against all "persons" subject to that Act.

We conclude that the plain language of Sections 7 and 11 of the Clayton Act strongly supports the proposition that Section 7 prohibits anticompetitive assets acquisitions by not-for-profit corporations, even when such corporations are not subject to the requirements of the FTC Act. Although our analysis might end here, we nonetheless look to the legislative histories of the relevant statutes to see if they support a different resolution. In construing congressional intent as discussed below, we are mindful that to interpret the Clayton Act otherwise would create a significant loophole in the coverage of this important antitrust statute. Our reading of the statute is buttressed both by the legislative histories and the case law.

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[23](...continued)
and Related Statutes, at 3756-58 [hereinafter *Kintner*]; 51 Cong. Rec. 8842-43 (1914), *reprinted in* 5 *Kintner* at 3783-86 (statement of Rep. Covington). *See also* T. Blaisdell, *The Federal Trade Commission: An Experiment in the Control of Business* 105-20 (1932); G. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* 19, 24-25, 45-46 (1924); Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 Admin. L. Rev. 461 (1990).

[24] *See, e.g.*, 2 *Kintner* at 989-90 (discussing different emphasis in scope of Clayton and FTC Acts).

B. The Relevant Legislative Histories

We now examine the legislative histories of these Acts and amendments to them, as they shed additional light on their proper interpretation.

1. The Original Clayton Act

Our examination of the relevant legislative histories begins with the original Clayton Act, as well as its amendments, because the complaint alleges a violation of that statute. Respondents have not identified, and our independent examination has not uncovered, anything in the legislative history of the Clayton Act discussing not-for-profit entities. Thus, if any congressional intent did exist to exempt not-for-profit entities from Clayton Act enforcement by the FTC, it would have to be inferred from other actions of Congress and the statements of individual Members of Congress.

Congress passed the FTC Act about one month before it passed the Clayton Act.[25] It thus had the opportunity to conform the Clayton Act to the FTC Act, if it had wanted to do so. This fact leads to a credible inference that Congress meant for the limitation on the Commission's jurisdiction over not-for-profit entities to be confined to matters arising under the FTC Act.

Respondents argue that the FTC Act's jurisdictional limitations were imported into Section 11 of the Clayton Act when Congress accepted an amendment to the original proposed Clayton Act enforcement language. *See* RAB at 26-28. Respondents' argument can be summarized by the following passage they quote from *United States v. FCC*, 652 F.2d 72, 84 (D.C. Cir. 1980) (*en banc*) (emphasis supplied by respondents):

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[25] The House of Representatives was the last chamber to pass each Act. The FTC Act passed the House of Representatives on September 10, 1914 (*see* 51 Cong. Rec. 14943 (1914), *reprinted in* 5 *Kintner* at 4756) and the Clayton Act passed the House of Representatives on October 8, 1914 (*see* 51 Cong. Rec. 16344 (1914), *reprinted in* 3 *Kintner* at 2833-34).

During much of the time the Clayton Act was debated the enforcement provisions of the two bills [the Clayton bill and the FTC bill] were identical. In fact, the Senate committee that reported the Clayton Act proposed language in the bill stipulating that, once a complaint has issued, "thereupon such proceedings shall be had as are provided for in section 5 of the [FTC] act." See 51 Cong. Rec. 14224 (Aug. 25, 1914) . . . . *Since the FTC bill had not yet been passed, however, the committee decided it would be inappropriate to refer specifically to that Act in the Clayton Act.* It therefore substituted for the formulation quoted above the actual language of Section 5 of the FTC bill as it then existed. Id. at 14321-14322 (Aug. 27, 1914) . . . .

There is no indication in the legislative history of the Clayton Act that that Act was intended to vest any less discretion in its enforcement agencies *than the FTC Act vested in the FTC.* On the contrary, the express purpose of using the language--as it was at the time--of Section 5 of the FTC bill was to *ensure that the enforcement provisions of the Clayton and FTC Acts would be exactly the same.* 51 Cong. Rec. 14224 (Aug. 25, 1914) (statement of Senator Walsh); *see Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1374 n.9 (9th Cir.), *cert. denied*, 439 U.S. 982, 99 S.Ct. 571, 59 L.Ed.2d 653 (1978).

Respondents assert that this history evinces a congressional intention to confine Clayton Act enforcement by the Commission to entities subject to FTC Act jurisdiction. Respondents further assert that the subsequent incorporation, through substitution, into the Clayton Act of language from Section 5 of the FTC Act is an additional indication of this hypothesized intent. But, neither the statutes nor their legislative histories support this proffered conclusion. Instead, this combination of legislative history and congressional action bolsters the exercise of FTC jurisdiction over not-for-profit corporations in Clayton Act cases.

The language respondents cite deals with procedural, and not jurisdictional, provisions.[26] While Congress intended to keep the procedures under the Clayton Act and the FTC Act harmonious, there is no discernible legislative intent to bring into conformity the respective jurisdictions conferred under the two Acts. Indeed, Senator Walsh, whose remarks are cited by the court in *United States v. FCC*, viewed the rationale as "obvious":

> Section 2 deals with one phase and aspect of unfair competition, as that expression is understood . . . in the trade commission bill. If therefore complaint were made of unfair competition by price cutting, charged as a violation of section 5 of the trade commission bill, the procedure before the trade commission would be after one manner. If, however, price cutting were charged in violation of the provisions of section 2 of this bill, the procedure would be before the trade commission, but by entirely different proceeding. I apprehend that no one would question that the two should be harmonized if that system is to go into force and effect at all.

51 Cong. Rec. 14266 (1914), *reprinted in* 3 *Kintner* at 2114.

Respondents' arguments also are not supported by the remaining fragments of the legislative history they have cited,[27] includ-

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[26] Respondents' quotation from *United States v. FCC*, as repeated in the text of this opinion, deleted the following sentence from the end of the first paragraph: "This language was ultimately adopted as Section 11(b) of the Clayton Act and is with us still." 652 F.2d at 84. Section 11(b) of the Clayton Act is a purely procedural provision. That provision is almost identical to Section 5(b) of the FTC Act, which sets forth similar procedures.

[27] For example, respondents quote an exchange between Senator Poindexter and Senator Walsh in which Senator Walsh concluded that "a Federal trade commission will be created *with some powers*." RAB at 20, quoting 51 Cong. Rec. 14323 (1914), *reprinted in* 3 *Kintner* at 2161 (emphasis added by respondents). Respondents assert that the underlined portion is a "jurisdictional

(continued...)

ing one sentence uttered by Senator Reed during an extended floor debate on the Clayton bill in which he asked that the Senate reconsider its vote to delete Section 4 from the Senate version of the bill. *See* RAB at 20, quoting 51 Cong. Rec. 14090 (1914), *reprinted in* 3 *Kintner* at 1990. The decision to delete Section 4, which forbade tying arrangements, had been made "in consequence of the passage of the trade commission bill." 51 Cong. Rec.

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[27](...continued)
reference to the FTC Act." *Id.* This is simply incorrect. The entire relevant exchange is as follows:

> Mr. Poindexter. Mr. President, I understood that the Senator from Montana substituted the amendment which was adopted this morning for the one he offered yesterday because the Federal trade commission referred to had not yet been established. I notice that *the amendment he offered this morning sets out the specific procedure; but it still vests the jurisdiction in the Federal trade commission*, and there is no such institution. I just thought I would call the Senator's attention to that, in view of the fact that he has been dealing with that general subject.
>
> Mr. Walsh. Mr. President, the fact had not been overlooked. We have indulged the expectation, or at least the hope, that a Federal trade commission will be created with some powers.
>
> Mr. Poindexter. I hope the Senator's expectation will be realized, but *I much prefer the amendment he had on yesterday, as being simpler in form, rather than repeating in a second statute the details of procedure*. If you are going to anticipate you might as well anticipate in one case as in the other.

51 Cong. Rec. at 14323 (1914), *reprinted in* 3 *Kintner* at 2161 (emphasis added).

While Senator Poindexter's principal point was that it made little sense to delete a reference to a non-existent agency and replace it with a procedure provision adopted from a non-existent statute, the import of the dialogue is significant. The amendments related solely to procedure in law enforcement actions. The Clayton bill, both before and after the amendments, had jurisdictional provisions distinct from those in the FTC Act.

14089 (1914), *reprinted in* 3 *Kintner* at 1988 (statement of Senator Culberson).[28] In urging reconsideration, Senator Reed said:

> As I was remarking, the trade commission finds its authority to act with reference to the practices referred to in section 4 of this bill, if it finds it anywhere, in section 5 of the trade commission bill. Section 5 simply provides "that unfair competition in commerce is hereby declared unlawful."

Id. at 14090, *reprinted in* 3 *Kintner* at 1990.

As of August 21, 1914, at the moment Senator Reed was urging the Senate to put Section 4 back into the Clayton bill, the trade commission bill was still pending in the Congress; its "exact nature and terms" were unknown (*id.* at 14322 (statement of Senator Walsh)); the version of the Clayton bill that had passed the House of Representatives did not even provide for FTC enforcement of the Clayton Act (H.R. 15657, 63d Cong., 2d Sess. (1914), *reprinted in* 2 *Kintner* at 1728-38); and the Senate had not yet voted on the committee proposal that the trade commission be given enforcement authority over certain provisions in the Clayton Act.[29] Senator Reed's comments concern the future commission's likely ability, or inability, to challenge tying arrangements under section 5 of the trade commission bill. (51 Cong. Rec. 14089-92 (1914), *reprinted in* 3 *Kintner* at 1987-95). His reference to the Commission's subject matter jurisdiction under section 5 of the trade commission bill cannot be equated with a congressional

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[28] "Passage" in this case cannot refer to final action by both Houses of Congress before sending the bill to the President, since such action occurred several weeks later. Here, it likely refers to action by one of the Houses.

[29] The Senate began its debate on Section 9b on August 25, 1914. 51 Cong. Rec. 14223, *et seq.* (1914), *reprinted in* 3 *Kintner* at 2066, *et seq.*; *see id.* at 14266, *reprinted in* 3 *Kintner* at 2114 (statement of Senator Walsh).

intention to exempt not-for-profit entities from FTC enforcement actions brought under the Clayton Act.[30]

2. The Original Federal Trade Commission Act

There appears to be no disagreement in this case that Section 4 of the FTC Act contains an express limitation on the definition of "corporation" that precludes any enforcement of Section 5 of the FTC Act against a corporation unless it "is organized to carry on business for its own profit or that of its members." Respondents have not pointed to anything in the legislative history of the FTC Act, express or implied, that this definition of "corporation" was meant to apply to the Clayton Act. Our examination of this legislative history also has not yielded any support for such an interpretation of Section 4 of the FTC Act. To the contrary, as discussed previously, we think that Section 11 of the FTC Act expressly precludes such an interpretation. Furthermore, as previously noted, in Section 6 of the Clayton Act, 15 U.S.C. § 17, and in the Non-Profit Institutions Act, 15 U.S.C. § 13c, Congress chose to provide certain exemptions which pointedly do not include the one urged by Respondents.

3. The 1950 Amendments

By 1950 it was clear that Section 7 of the Clayton Act was an ineffective tool for preventing anticompetitive acquisitions and mergers. As we have noted, the original Section 7 prohibited only stock acquisitions. Asset acquisitions were beyond the statute's reach. *See United States v. Columbia Steel Co.*, 334 U.S. 495,

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[30] In its report on H.R. 15657, the Senate Judiciary Committee stressed that the bill was not intended to alter the Sherman Act (which had defined corporations in a way that included not-for-profit corporations), and stated that certain provisions of the proposed law should be enforced by a new agency, "to be created," the Federal Trade Commission, "in the case of individuals and corporations other than banks and common carriers." S. Rep. No. 698, 63d Cong., 2d Sess. 2, 42 (1914), *reprinted in* 2 *Kintner* at 1744-45.

507 n.7 (1947). Hence, the statute's strictures were easily evaded. Furthermore, the Supreme Court had held that the Federal Trade Commission could not remedy an unlawful stock acquisition by ordering the divestiture of assets. *See Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934); *Thatcher Mfg. Co. v. FTC* and *Swift & Co. v. FTC*, decided together with *FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

It was against this general background that Congress in 1950 enacted the Celler-Kefauver Antimerger Act, 64 Stat. 1125-29 (1950). The Act amended Section 7 to include an assets acquisition provision. As amended, Section 7 provided in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation* engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id. (emphasis added). The Act also amended Section 11 to make clear the Commission's power to compel the divestiture of assets, but did not modify, in any significant way,[31] the language in the first paragraph of Section 11, which vests jurisdiction in the various agencies to enforce Sections 2, 3, 7 and 8 of the Clayton Act.

Nothing in the language of the Celler-Kefauver Act or in its legislative history suggests a congressional purpose to limit or

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[31] In the intervening years the section had been amended to vest enforcement authority in the Federal Communications Commission and the Civil Aeronautics Authority. The only modification to Section 11's first paragraph made in 1950 was to change "Civil Aeronautics Authority" to "Civil Aeronautics Board." *See* S. Rep. No. 1775, 81st Cong., 2d Sess., 8 (1950), *reprinted in* 4 *Kintner* at 3526.

restrict the Commission's jurisdiction. Indeed, respondents concede that "[i]n none of the reports and debates leading up to the enactment of the 1950 Amendments to Section 7 is there any discussion of the activities of either not-for-profit community hospitals or any other not-for-profit institutions." RAB at 29; *see United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1280-81 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990). Similarly we divine no intent in the Celler-Kefauver Act to change the Clayton Act's jurisdictional bases to require the FTC to enforce the Clayton Act under the jurisdictional limitations of a separate statue.[32]

One more point regarding the Celler-Kefauver Act merits discussion. Congress reenacted much of the original language in Sections 7 and 11 when it passed the Celler-Kefauver Act. This is significant, because the unambiguous purpose of the 1950 amendment was to expand the coverage of Section 7 and close loopholes in the existing legislation. In *Philadelphia National Bank*, the Court held that Section 7's stock acquisition clause took on a broader coverage because of the 1950 amendments, even though the words in the clause were unchanged:

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[32] The logical conclusion of respondents' argument is that the "jurisdiction" clause in Section 7 is nonsense. Assuming *arguendo* that the Commission's authority to enforce the Clayton Act derives from Section 5 of the FTC Act, it follows that the Commission lacks authority to enforce any provision of Sections 2, 3, 7, and 8 of the Clayton Act against not-for-profit entities, including the stock acquisition clause in Section 7. But if that were correct, it would follow that Congress was redundant in eliminating, as respondents contend, the Commission's jurisdiction over not-for-profit entities in the asset acquisition clause. *See Philadelphia Nat'l Bank*, 374 U.S. at 346.

While respondents might answer that the "jurisdiction" clause works to exempt not-for-profit entities not only from FTC jurisdiction but also from law suits by any other plaintiff, this answer is untenable. Nothing in Celler-Kefauver evinces a purpose to exempt not-for-profit entities. If Congress intended to create so broad a gap in Section 7 coverage, it could have spelled out that intention in the language of the statute. We decline to hold that we can imply congressional intent to exempt not-for-profit entities from jurisdiction when no express language, intent or purpose exists to support that determination.

> Thus, the stock-acquisition provision of § 7, though reenacted *in haec verba* by the 1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer.

374 U.S. at 346.

Doubt -- if any -- about the Commission's jurisdiction under the original, 1914, version of Section 11 should be resolved by the "new context" in which the reenacted language appears in 1950. As we have noted, and as respondents have conceded, Congress did not even consider exempting not-for-profit entities in 1950.

4. The 1977 and 1989 Proposals to Amend the FTC Act and the 1980 Amendment to the Clayton Act

Respondents have implied in their brief and during oral argument that statements made by former FTC officials to Congress concerning the scope of FTC Act coverage in the nonprofit area limit the Commission's jurisdiction over nonprofit corporations under the Clayton Act. See RAB at 15 n.5; TOA at 34. It is clear from the full context of the statements of those former FTC officials that their remarks were limited to a discussion of FTC Act jurisdiction and there was no consideration given to the FTC's authority to enforce the Clayton Act.

In 1977, then-FTC Chairman Collier testified in support of a bill that would have amended several provisions in the FTC Act, including Section 4's definition of "corporation." Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 68 *et seq.* (1977) (statement of Hon. Calvin J. Collier, Chairman, FTC). In his oral statement, Chairman Collier said: "The bill would make several changes in the jurisdiction of the Commission. In particular, it would: (1)

Broaden the reach of the FTC Act by redefining "corporation" to include nonprofit corporations . . . ." *Id.* at 69 (emphasis added). This oral testimony focuses solely on the Commission's authority under the FTC Act and does not bear in any way on its authority, responsibilities, or jurisdiction under the Clayton Act.

Chairman Collier's written testimony (*id.* at 81-82) is even clearer in this regard. After discussing the difficulties the Commission had experienced in dealing with "nonprofit" respondents in several FTC Act cases,[33] he said:

> Thus, recent interpretations of Section 4 have made it difficult for the Commission, without considerable delay and expense, to reach the anticompetitive or deceptive practices of any nonprofit corporation, whether of a charitable character or not. The result has naturally been to discourage Commission activities with respect to nonprofit organizations, even though *it is increasingly clear that "charitable" organizations have been responsible for very substantial fraud and other conduct that violates the FTC Act.*

Id. at 82 (emphasis added).[34]

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[33] Chairman Collier discussed or mentioned: *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1972); *Community Blood Bank of Kan. City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969); *Chamber of Commerce v. FTC*, 13 F.2d 673 (8th Cir. 1926).

Cement Institute actually concerned violations of both the FTC Act and the Clayton Act, but the trade association was plainly operating for the profit of its members, and Chairman Collier cited the case as an example in which "the language of Section 4 did not present a serious problem." Hearings on H.R. 3816 at 82. Indeed, it appears that the jurisdictional issue was not even litigated in that case.

[34] That Chairman Collier's comments involved the FTC Act, and not the Clayton Act, is further evinced by a dialogue between Congressman Rinaldo and Chairman Collier in which Chairman Collier referred only to expanded Commission jurisdiction over entities engaged in "unfair or deceptive acts or

(continued...)

Thus, there is nothing "inconsistent" between Chairman Collier's congressional testimony in 1977 and our conclusion in this case that the Commission has jurisdiction under Section 11 of the Clayton Act to enforce that Act against not-for-profit corporations.[35]

The same result obtains with respect to then-Director of the FTC Bureau of Consumer Protection MacLeod's 1989 testimony which respondents offered into the Record. See pages 171-84 of the Record. Deception Fundraising by Charities: Hearing Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 82-88 (1989). Mr. MacLeod never refers to the Clayton Act in that testimony. Moreover, he states, in part: "*Absent some other grounds for jurisdiction*, we are unlikely to open an investigation into charities that have been granted tax-exempt status by the IRS under Section 501(c)(3) of the Internal Revenue Code." *Id.* at 176 (emphasis added). Thus, Mr. MacLeod's testimony leaves open the possibility of alternative grounds for Commission jurisdiction over certain not-for-profit corporations.

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[34](...continued)
practices affecting commerce and unfair methods of competition affecting commerce" to reach, for example, false solicitations and false advertising by nonprofit entities. Thus, his answers were directed to the FTC Act's definition of "corporation" and the Commission's power to enforce the FTC Act, not the Clayton Act. *Id.* at 99.

[35] Respondents also point to a comment by a representative of nine nonprofit organizations, stating her understanding that an amendment to the FTC Act would work to make nonprofit entities subject to Section 7. RAB at 30, citing Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Practice and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. at 537 (1977) (testimony of Frances T. Farenthold). Another representative of those organizations stated that it was not clear whether nonprofit entities were then subject to Section 7 of the Clayton Act. *Id.* at 547 (testimony of Julian Atwater). These, however, are the views of witnesses with whom we disagree for the same reasons we disagree with respondents.

In 1980, Section 7 of the Clayton Act was amended, once again, to prohibit anticompetitive acquisitions by any "person" of another "person." Previously, the statute had prohibited such acquisitions by, or of, a "corporation." *Compare* 15 U.S.C. § 18, *with* 64 Stat. 1125 (1950). The amendment was intended to close a loophole in Section 7's coverage and to bring Section 7 into line with the coverage of the Hart-Scott-Rodino Antitrust Improvements Act. 15 U.S.C. § 18a. *See* H.R. Rep. No. 871, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 2732.

This amendment is worth noting for two reasons. First, it again expanded the coverage of Section 7 and manifests a repeated congressional intention to reach nearly all transactions that may have anticompetitive effects, exempting only "pure" asset acquisitions in certain regulated industries. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 342 (1963). This suggests that the jurisdictional provisions in Section 11 of the Act should not be construed narrowly to exempt a class of entities by implication. Second, by deleting the reference to "corporation" in favor of "person," the 1980 amendment makes Section 7 reach all entities, as defined in Section 1 of the Act, 15 U.S.C. § 12, subject to the Act. If prior to 1980 there was an argument that the term "corporation" under the Clayton Act was synonymous with the term "corporation" under the FTC Act, that argument has been precluded by inserting the term "person" into Section 7.[36]

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[36] We think the two statutes would not support such an interpretation merely because both define "corporation." Any confusion on the point might arise only because the FTC Act defines the term expressly, while the Sherman and Clayton Acts define the term by stating that "person" includes corporation.

Respondents turn the 1980 amendment on its head when they assert that, by amending Section 7, but not Section 11, "Congress reaffirmed that the 'jurisdictional reach of Section 7 of the Clayton Act [was] co-extensive with that of Section 5 of the FTC Act.'" RAB at 30-31, quoting H.R. Rep. No. 871, at 5, *supra*. As with respondents' other citations to the legislative history, this one needs to be put into context. The entire relevant quote is:

(continued...)

We think that the structures and plain meaning of the FTC and the Clayton Acts and their legislative histories taken together demonstrate that acquisitions by not-for-profit entities are within the Commission's reach in enforcing the Clayton Act.

C. The Relevant Case Law

1. The *Philadelphia National Bank* Decision

The most significant case expounding upon the jurisdictional basis for Section 7 of the Clayton Act is the Supreme Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). In that case, the Department of Justice challenged the consolidation of the second- and third-largest commercial banks in

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[36](...continued)

> Section 7 was intended to supplement the Sherman Act by reaching incipient monopolies and restraints of trade before they become full fledged monopolies subject to the proscriptions of Section 2 of the Sherman Act. It is anomalous that the statute designed to prevent incipient monopolies has less jurisdictional reach than the statute designed to prevent the use of monopoly power in contravention to the law . . . .
>
> [The pending legislation] would remove an arbitrary limitation on the law, thereby bringing Section 7 into jurisdictional harmony with Sections 1 and 2 of the Sherman Act and Section 7A of the Clayton Act. The jurisdictional reach of Section 7 of the Clayton Act will also become co-extensive with the authority granted to the FTC under Section 5 of the FTC Act.

Id. at 4-5.

It is difficult to see how a statute can be "in harmony" with Sections 1 and 2 of the Sherman Act, and Section 7A of the Clayton Act (all of which reach nonprofit entities – and one of which is enforced by the Commission (*i.e.*, Section 7A, 15 U.S.C. § 18a)) and "co-extensive" with Section 5 of the FTC Act. Unless the whole quotation is considered in context, it is ambiguous. In context, it demonstrates a congressional purpose to expand Section 7 to its full limit and not a desire to limit FTC enforcement authority. *See United States v. Rockford Memorial Corp.*, 898 F.2d at 1281.

the Philadelphia metropolitan area under both Section 1 of the Sherman Act and Section 7 of the Clayton Act.

In the text of its opinion, the Court makes a straightforward statement concerning the limitations on the FTC's jurisdiction: "The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. § 45(a)(6). Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7."[37] This is a fairly strong conclusion by the Court that it is the FTC Act, rather than anything else, that precludes the FTC from enforcing Section 7 of the Clayton Act against banks. Indeed, if this were the end of the analysis and we had to apply the quoted sentences to not-for-profit corporations without more, we would be reluctant to decide that assets acquisitions by not-for-profit corporations are subject to the Clayton Act.

However, the above quote is not the end of the analysis. First, the issue of the FTC's jurisdiction over assets acquisitions involving banks was not the subject of more than a cursory analysis by the parties before the Court.[38] In fact, the parties appear to have assumed that the Commission lacked such jurisdiction and the record is, at best, confusing regarding the basis for this assumption.[39]

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[37] 374 U.S. at 336 (footnote omitted).

[38] *See United States v. Philadelphia National Bank* in 13 Antitrust Law: Major Briefs and Oral Arguments of the Supreme Court of the United States, 1955 Term - 1975 Term 1-376 (P. Kurland & G. Casper eds. 1979). This probably explains the first sentence of Justice Harlan's dissent: "I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court." 374 U.S. at 373 (Harlan, J., dissenting) (Justice Stewart joined in that dissent).

[39] Of course, because the Justice Department argued in *Philadelphia National Bank* and the Court agreed that it was the stock acquisition clause of Section 7 that provided the jurisdictional basis for the proposed bank consolidation, there was little need for precision on the issue of why the assets acquisition clause did not provide jurisdiction.

Second, in the footnote that accompanies the quote from the Court's opinion, the Court addressed the relationship of Sections 7 and 11 of the Clayton Act. In relevant part, the Court stated:[40]

> [I]t is clear from the language of § 11 that "banks, banking associations, and trust companies" are meant to comprise a distinct "character of commerce," and so cannot be part of the "other character of commerce" reserved to the FTC.
>
> The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that the banks were already subject to extensive federal administrative controls. *See T.C. Hurst & Son v. Federal Trade Comm'n*, 268 F. 874, 877 (D.C.E.D. Va. 1920).

Obviously, not-for-profit corporations are different from banks in the sense that not-for-profit corporations do not "comprise a distinct 'character of commerce'" as defined under Section 11. While hospitals may comprise a distinct character of commerce, respondents are not arguing that it is their status as hospitals that makes them exempt from FTC jurisdiction, but their status as not-for-profit corporations. After all, there is no doubt that proprietary hospitals are subject to the assets acquisition clause of Section 7 of the Clayton Act.

Third, the Court appeared to be impressed that the banking industry was "already subject to extensive federal administrative controls." Neither not-for-profit corporations nor hospitals are included in the four highly-regulated industries specified in Section 11 (*i.e.*, ICC-regulated common carriers, FCC-regulated common carriers, DOT-regulated air carriers, and FRB-regulated banks).[41]

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[40] *Id.* at 336 n. 11.

[41] Later, in its opinion, the Court added that excluding from Section 7 coverage assets acquisitions not by merger in industries outside the FTC's jurisdiction (continued...)

Fourth, respondents' interpretation of *Philadelphia National Bank* runs counter to the overall thrust of the Court's opinion. The Court construed broadly the 1950 Celler-Kefauver amendment to Section 7 that added the assets acquisition clause to fill a perceived gap in antitrust enforcement: "[T]he basic congressional design clearly emerges and from that design the answers to these questions may be inferred. Congress primarily sought to bring mergers within § 7 and thereby close what it regarded as a loophole in the section." 374 U.S. at 341.

In addition, it appears that the Court sought to interpret the amended Section 7 as broadly as possible while placing the least possible limitation on the assets acquisition clause:

> In other words, Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, *read together*, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum . . . . So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.

Id. at 342 (emphasis in original). The Court made this point most forcefully when it provided its rationale for the statutory construction it employed: "Any other construction would be illogical and

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[41](...continued)
"does not appear to create a lacuna of practical importance." *Id.* at 344 (footnote omitted). In an accompanying footnote, the Court explained that administrative agencies such as the CAB (whose functions were taken over by DOT years after the Court's opinion), FRB, and ICC provide adequate review of industry participants within their jurisdiction so that "the exclusion of assets acquisitions in such industries from § 7 would seem to have little significance." *Id.* at 344 n. 22. Once again, this analysis does not apply to acquisitions by not-for-profit corporations or hospitals.

disrespectful of the plain congressional purpose in amending § 7, because it would create a large loophole." *Id.* at 343. Similarly, the Court declared that the 1950 amendment to the Clayton Act "was clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction." *Id.* at 348.

Thus, it is fair to read the Court's opinion in *Philadelphia National Bank* as interpreting Section 7 expansively. A corollary point buttresses this conclusion. As the Court said:

> It is settled law that "[i]mmunity from the antitrust laws is not lightly implied." *California v. Federal Power Comm'n*, 369 U.S. 482, 485. *Cf. United States v. Borden Co.*, 308 U.S. 188, 198-199; *United States v. Southern Pac. Co.*, 259 U.S. 214, 239-240. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry from the stock-acquisition as well as the assets-acquisition provision

Id. at 348. As Part III.B. of this opinion establishes, there is no indication in the legislative history to the FTC Act, the Clayton Act or amendments to those statutes that Congress intended to confer a special dispensation upon not-for-profit entities for purposes of Section 7 of the Clayton Act or that Congress intended to have the FTC Act interpreted as a restriction on the Clayton Act. To the contrary, as noted earlier in this opinion, Section 11 of the FTC Act expressly provides that the FTC Act is not to be construed to alter or modify the Clayton Act or any other antitrust act.[42] Further, if Congress had intended to confer such a special

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[42] *See supra* at pages 9-10.

dispensation, it logically would have exempted not-for-profit entities from the assets acquisition provision as it did for not-for-profit entities originally covered by the Robinson-Patman Act provisions of the Clayton Act.[43]

The Supreme Court subsequently has applied this "canon of construction" in the context of nonprofit hospitals. In its *Abbott Laboratories* decision,[44] the Court examined Section 2c of the Clayton Act, 15 U.S.C. § 13c, and decided that the exemption added to the Robinson-Patman Act for nonprofit hospitals was "to be construed strictly."[45] The Court analyzed the legislative history of this statutory exemption and determined:[46]

> The Congress surely did not intend to give the hospital a blank check. Had it so intended, it would not have qualified purchases by nonprofit institutions in the way it did in

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[43] During oral argument, Respondents contended that since not-for-profit corporations do not issue stock, the implication is that such corporations are exempt from Section 7 of the Clayton Act. *See* TOA at 31. We note that the antitrust laws are strictly construed and we disfavor their implied repeal. No language in Section 7 of the Clayton Act states that not-for profit corporations are exempt from FTC scrutiny. Moreover, the question of whether Section 7 of the Clayton Act limited coverage only to corporations makes no difference since the jurisdictional language in Section 1 of the Act was expanded in 1980 to reach acquisitions done by any person. We also note that respondents contend that one must examine the Clayton and FTC Acts *in pari materia* to determine the meaning of each of the Acts. The FTC Act strictly defines a not-for-profit corporation under Section 4 of the Act. It would be anomalous indeed if Congress, which showed it could specifically delineate definitions for a not-for-profit corporation under Section 4 of the FTC Act, suddenly meant to exclude a not-for-profit corporation from coverage under the Clayton Act, enacted within a month of the FTC Act, without explicitly saying so.

[44] *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976).

[45] *See* 425 U.S. at 11. Section 2c of the Clayton Act is also discussed *supra* at page 5.

[46] 425 U.S. at 13.

> § 13c. See H.R. Rep. No. 1983, 90th Cong., 2d Sess., 78-79 (1968). We are concerned, after all, with an exemption from an antitrust statute, and the accepted general principles [that antitrust exemptions are to be construed strictly], do have application even in the nonprofit hospital context.

The Court subjected nonprofit hospitals to possible treble damage liability under the Robinson-Patman Act in certain situations, despite the statutory exemption for nonprofit hospitals.[47]

2. The *University Health*, *Rockford* and *Carilion* Decisions

In the decades after the *Philadelphia National Bank* decision, three federal courts have considered the issue of whether not-for-profit hospitals making assets acquisitions may be subjected to a government antitrust prosecution under the Clayton Act. We discuss these three cases, and their significance, below.

The most recent case pertaining to assets acquisitions by nonprofit hospitals is *FTC v. University Health, Inc.*, No. 91-8308 (11th Cir. May 6, 1991). In that case, the FTC sought a preliminary injunction to prevent the acquisition of St. Joseph Hospital, a nonprofit hospital, by University Health, Inc., a nonprofit corporation that owns University Hospital, another nonprofit hospital in the Augusta, Georgia area. While the district court denied the request for a preliminary injunction, it also denied defendants' motion to dismiss on the nonprofit issue.

The Commission appealed the adverse decision on the preliminary injunction to the Eleventh Circuit. The appellate court issued an order reversing the district court's denial of the preliminary

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[47] For other Supreme Court decisions emphasizing that exemptions from the antitrust laws are to be narrowly construed, *see, e.g.*, *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

injunction. While the Eleventh Circuit's terse order contains no discussion of jurisdiction (the parties at this time are awaiting an opinion), that issue was briefed by both parties and the court necessarily had to find that assets acquisitions by nonprofit hospitals are covered by Section 7 in order for it to reach its decision on the merits of the preliminary injunction.

The next most recent case, which also contains a thorough analysis of the issues presented here, is *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S.Ct. 295 (1990). The *Rockford* case involved a suit by the Antitrust Division of the Department of Justice to enjoin a proposed consolidation of two nonprofit hospitals. The complaint alleged that the proposed consolidation would violate both Section 7 of the Clayton Act and Section 1 of the Sherman Act. The district court held that the merger violated Section 7 and issued an injunction without reaching the Section 1 issue. The defendants appealed, raising the argument that the consolidation of two nonprofit hospitals was not encompassed by Section 7 of the Clayton Act.

In defense of the appeal, the Justice Department argued that the consolidation was covered by the stock acquisition clause of Section 7. The Justice Department did not argue that the consolidation was covered by the assets acquisition clause of Section 7.[48] The Seventh Circuit agreed with the defendants that the stock acquisition clause did no apply because nonprofit corporations were

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[48] Indeed, as respondents point out in their brief in this case, the Justice Department's lawyers in *Rockford* conceded that the FTC has no Section 7 jurisdiction over assets acquisitions by not-for-profit corporations because "the FTC has no jurisdiction over nonprofit corporations under Section 5 of the [FTC] Act." *See* RAB at 35 (citing Memorandum of the United States in Support of its Motion for a Preliminary Injunction at 5-6, *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989)). This admission by the Justice Department does not bind the FTC. We are not privy to the trial strategy considered and chosen by the Justice Department's lawyers. We note that merely because the Justice Department may have conceded this point before trial does not mean that after full briefing and argument an adjudicative body would not decide otherwise. To the contrary, the precise issue is now being considered in contested litigation with full briefing by the parties.

forbidden by Illinois law to have stock or share capital and because the court was unwilling to extend the broad reading of the stock acquisition clause that was used by the Supreme Court in *Philadelphia National Bank*. See 898 F.2d at 1280, 1281.

Judge Posner, writing for the court, evaluated the assets acquisition clause argument. Because his analysis represents the most comprehensive discussion by any court to date of the applicability of this clause to not-for-profit corporations generally (and not-for profit hospitals in particular), we set it out in full:[49]

> [Defendants'] second argument [that Section 4 of the FTC Act limits the scope of Section 7 of the Clayton Act], in assuming that the reference in Section 7 to "person[s] subject to the jurisdiction of the Federal Trade Commission" is to the Federal Trade Commission Act, overlooks the possibility that the reference is actually to the provision in the Clayton Act itself concerning the jurisdiction of the FTC -- namely section 11, 15 U.S.C. § 21. Section 11 vests authority to enforce the prohibitions of the Clayton Act in five agencies. These are the Interstate Commerce Commission, with respect to the common carriers regulated by that Commission; the Federal Communications Commission, with respect to the common carriers regulated by it; ditto for the Civil Aeronautics Board (now defunct); the Federal Reserve Board, for banks; and, for everyone else, the FTC: "Authority to enforce compliance with sections 2, 3, 7 and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . the Federal Trade Commission where applicable to all other character of commerce." Section 11 goes on to prescribe the procedure to be followed by these commissions and boards that have been given jurisdiction to enforce the Act. The procedure is self-contained and does not depend on particular provisions in the agencies' organic statutes, so that when in 1950

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[49] *Id.* at 1280-81.

> Congress amended section 7 to broaden its reach, it amended section 11 as well. We believe that the force of the assets acquisition provision in section 7 is, therefore, merely to exempt mergers in the regulated industries enumerated in section 11. Areeda & Turner, Antitrust Law ¶ 906, at p. 797 n. 2 (1989 Supp.). Those industries do not include the hospital industry. The Clayton Act evinces a purpose of limiting the Federal Trade Commission's jurisdiction vis-a-vis that of other federal agencies charged with enforcing the Act in the industries that they regulate, but it evinces no purpose of exempting nonprofit firms in industries within the domain that the Act bestows on the Commission ("all other character of commerce").

After providing this analysis, the Seventh Circuit commented on the district court decision in *United States v. Carilion Health System*:[50]

> [W]e believe (contrary to *United States v. Carilion Health System*, 707 F.Supp. 840, 841 n. 1 (W.D.Va.), *aff'd without opinion*, 892 F.2d 1042 (4th Cir.1989)) that the merger *is* subject to section 7, once the reference in that section to the jurisdiction of the FTC is understood, as we think it should be understood, to refer to section 11 of the Clayton Act rather than to section 4 of the FTC Act.

Despite the willingness of the appellate court to evaluate the merits of the applicability of the assets acquisition clause to not-for-profit acquisitions, the court's analysis is dicta.[51] As pointed out previously, the Department of Justice conceded before trial that the FTC has no jurisdiction over nonprofit corporations under the FTC Act and that this precluded the Commission's

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[50] *Id.* at 1281 (emphasis in original).

[51] As the Seventh Circuit exclaimed: "The government amazingly has failed to make this [assets acquisition] argument (thus waiving it) . . . ." *Id.* at 1281.

jurisdiction under the Clayton Act. Although the court's analysis is dicta, it is well-considered and is accorded due respect by the Commission.[52]

The Seventh Circuit had the benefit of two briefs that explicitly addressed the assets acquisition argument. One brief was from the defendants/appellants, raising the same arguments as those raised by respondents here.[53] The second brief was from the Voluntary Hospitals of America, Inc., as amicus curiae in support of the defendants/appellants.[54] Yet, despite two briefs arguing against assets acquisition jurisdiction, and no counterarguments offered, the Seventh Circuit reached the opposite conclusion from that urged by the *Rockford* defendants.

The Seventh Circuit then evaluated the hospital merger under Section 1 of the Sherman Act and determined that it posed a restraint of trade within the meaning of the statute. The appellate court affirmed the decision of the district court to enjoin the merger.

The last case, but earliest decided in this series, is *United States v. Carilion Health System*, 707 F. Supp. 840 (W.D. Va.), *aff'd*

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[52] *See, e.g., Max M. v. Thompson*, 585 F. Supp. 317, 324 (N.D. Ill. 1984) ("In the absence of a controlling Supreme Court ruling, a federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of *dictum*."); *Harvey v. Levine*, 204 F. Supp. 947, 953 (N.D. Ohio 1962) (unless dictum from the court of appeals had been repudiated by that court, it must be accorded great weight by a district court); *United States v. Certain Lands in Jackson County, Mo.*, 69 F. Supp. 565, 569 (W.D. Mo. 1947) ("Although not essential to the disposition of a case, judicial dictum, as distinguished from obiter dictum, becomes an authoritative statement when it is expressly declared by a court and announced as a guide for future conduct.").

[53] *See* CCAB, Appendix A (Brief of Appellants Rockford Memorial Corporation and SwedishAmerican Corporation at 7-13, filed before the Seventh Circuit in *Rockford*).

[54] *See* CCAB, Appendix B (Brief of Amicus Curiae Voluntary Hospitals of America, Inc. in Support of Appellants at 2-10, filed before the Seventh Circuit in *Rockford*).

mem., 892 F.2d 1042 (4th Cir. 1989) (per curiam). In the *Carilion* case, like the later *Rockford* case, the Antitrust Division of the Department of Justice brought an antitrust action to prevent the merger of two nonprofit hospitals -- this time in Roanoke, Virginia. The government claimed that defendants' planned affiliation would violate Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act.

In an unpublished memorandum opinion referred to in its later published memorandum opinion, the district court dismissed the government's Clayton Act claim. *See id.* at 841 n.1 (citing the district court's Memorandum Opinion on Defendants' Motion to Dismiss dated Sept. 30, 1988). The district court found that the stock acquisition clause of Section 7 did not apply to defendants because as non-stock, not-for-profit corporations no stock was involved in their transaction. The court further ruled that the assets acquisition clause of Section 7 did not apply to defendants because the FTC Act did not confer jurisdiction over nonprofit entities.[55] The case proceeded to trial on the Sherman Act claim and the district court found that the merger would not constitute an unreasonable restraint of trade under that Act.

The government appealed the adverse decision to the United States Court of Appeals for the Fourth Circuit. The appellate

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[55] *See id.* The unpublished memorandum opinion of September 30, 1988, of which we take judicial notice, does not shed much light on the reasoning the district court employed to reach the conclusion that the reference in Section 7 to "the jurisdiction of the Federal Trade Commission" refers to the FTC Act rather than to Section 11 of the Clayton Act. On page 4 of that opinion, the court wrote "[t]he FTC lacks jurisdiction over the defendants because of their nonprofit status. 15 U.S.C. § 44 (1982)." After discussing why the acquisition in question was not covered by the stock acquisition clause of Section 7, the district court stated: "Section 7's [assets acquisition] clause does not apply to the transaction either, because defendants are not subject to the FTC's jurisdiction." The court's opinion does not reveal whether it considered and rejected the argument that Section 11 might provide an independent basis for the FTC's jurisdiction over the nonprofit hospital assets acquisition. *See United States v. Carilion Health Sys.*, No. 88-0249-R, slip op. at 4, 6 (W.D. Va. Sept. 30, 1988) (memorandum opinion granting defendants' motion to dismiss as to Section 7 of the Clayton Act.).

court issued a *per curiam* decision designated "not for publication," which affirmed the district court's Sherman Act findings as not "clearly erroneous." *United States v. Carilion Health System*, 1989-2 Trade Cas. (CCH) ¶ 68,859 (4th Cir. Nov. 29, 1989) (*per curiam*). The Fourth Circuit declined to address the Clayton Act jurisdictional issue, stating: "Because we see no need for further proceedings in the district court, we have no occasion to consider whether § 7 of the Clayton Act would apply to this merger." *Id.* at 62,516.

In assessing the contrasting analyses employed by the *Carilion* and *Rockford* courts on the assets acquisition issue, we find the *Rockford* decision more persuasive for three reasons. First, it is not apparent from the district court decision in *Carilion* that the court even considered the possibility that Section 11 of the Clayton Act might provide an independent basis for the FTC's jurisdiction to enforce Section 7. It is evident, however, from the Seventh Circuit's decision in *Rockford* that the appellate court analyzed this possibility as well as the argument accepted by the *Carilion* court that Section 7 of the Clayton Act refers to Section 4 of the FTC Act.

Second, on appeal, the Fourth Circuit declined to consider whether Section 7 of the Clayton Act would apply to the merger at issue in the *Carilion* case. Accordingly, even though the *Rockford* court's analysis of the assets acquisition issue is dictum, we find Judge Posner's thoughtful explication more persuasive than the conclusory findings of the district court in *Carilion*. Third, the Seventh Circuit had the benefit of the *Carilion* district court's decision (in addition to two briefs on the assets acquisition issue). As such, the question of jurisdiction over acquisitions by nonprofit entities received the fullest airing to date in the Seventh Circuit forum.

IV. WHETHER THIS ACQUISITION WAS "TANTAMOUNT IN ITS EFFECTS TO A MERGER"

We have concluded that Section 7 of the Clayton Act covers assets acquisitions by nonprofit entities, even if we accept respondents' assertion that the Commission could not challenge the acquisition here if it were considered solely under the FTC Act.[56] Thus, we need no and do not address the second issue raised on appeal from the ALJ's initial decision of whether this acquisition was tantamount in its effects to a merger.

V. CONCLUSION

Upon a full review of the existing record, the initial decision and the arguments presented by complaint counsel and respondents, we have concluded that Section 7 of the Clayton Act reaches assets acquisitions by nonprofit hospitals. In our view, the plain language of the Clayton Act compels that result. This conclusion is well buttressed by relevant legislative histories and case law. Further, unlike the situation that exists for the other four specified regulatory agencies denominated in Section 11 of the Clayton Act, assets acquisitions by not-for-profit corporations would be exempt from scrutiny by anyone under Section 7 of the Clayton Act if we adopted respondents' contentions to hold that nonprofit entities are not subject to the FTC's Clayton Act jurisdiction. Without divining any congressional intent to create such a chasm in antitrust enforcement, and for the other reasons set forth above, we think such a result was not intended by Congress in enacting and amending the Clayton Act.

For the reasons discussed above, we hereby reverse the Administrative Law Judge's initial decision and remand for further proceedings consistent with this opinion.

ISSUED: August 2, 1991

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[56] We reiterate that the issue of the FTC's jurisdiction under the FTC Act is not an issue in this case and we intimate no views in that regard.

APPENDIX G

ORDER OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA JANUARY 30, 1990

Ukiah Valley Medical Center,
formerly known as Ukiah Adventist Hospital,
and Adventist Health System/West

v.

Federal Trade Commission.

No. C 89 4494 AJZ

U.S. District Court,
Northern District of California

Filed January 30, 1990.

Order

Zirpoli, D.J.: This matter is before the court upon plaintiffs Ukiah Valley Medical Center and Adventist Health System/West's (collectively Ukiah) motion for a preliminary injunction. Plaintiffs request that the court enjoin defendant Federal Trade Commission (FTC) from continuing any further administrative action with respect to the defendant's administrative complaint against plaintiffs. In a previous Order, this court denied the plaintiffs' motion for a temporary restraining order. Order, December 20, 1989 (Henderson, J.). Defendant has filed a motion to transfer this action to the Ninth Circuit Court of Appeals, or in the alternative, a motion to dismiss.

Facts

Prior to July 1988, Ukiah Valley Medical Center, a not-for-profit California Corporation, owned and operated a 43 bed hospital in Ukiah, California. The Ukiah Hospital Corporation, prior to July 1988, owned and operated a 51 bed hospital in Ukiah, California. In an agreement reached between the two hospitals in July of 1988, Ukiah Valley acquired substantially all the assets of Ukiah Hospital Corporation. Adventist Health System/West (Adventist Health), is also a not-for-profit California corporation, whose board of directors are the board of directors for Ukiah Valley.

Since August of 1988, the FTC has investigated Ukiah Valley's acquisition of Ukiah General. On February 3, 1989, the FTC issued a subpoena *duces tecum* to Adventist Health. After a hearing before an FTC Commissioner, the FTC denied the plaintiffs' motion to quash. On April 10, 1989, the full commission adopted the FTC Commissioner's ruling and ordered plaintiff Adventist Health to comply with the subpoena. On November 7, 1989, the FTC issued, and on November 20, 1989, served, its complaint upon plaintiffs, charging plaintiffs with violating Section 7 of the Clayton Act, 15 U.S.C. §18.[1]

Analysis

The FTC asserts that interlocutory challenges to a non-final agency proceedings may only be brought in the Court of Appeals. The FTC notes that in administrative cases, the court which has exclusive jurisdiction to review a final order of an administrative agency has exclusive jurisdiction to review a non-final agency order. Citing *Public Utility Commissioner v. Bonneville Power Administration*, 767 F.2d 622 (9th Cir. 1985), and *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), the FTC claims that the Ninth Circuit is the only court

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[1] Plaintiffs filed an answer to the FTC complaint on December 26, 1989.

vested with the authority to review the Commission's decision to issue the complaint against the plaintiffs. Plaintiffs argue, citing *Sunkist Growers, Inc. v. F.T.C.*, 464 F.Supp. 302 (C.D. Cal. 1979), and *Sable Communications of California, Inc. v. F.T.C.*, 827 F.2d 640 (9th Cir. 1987), that the district court has the authority to review the FTC's issuance of the complaint, as the FTC Act does not "expressly limit the district court's ability to hear statutory or constitutional challenges to the FTC's unlawful exercise of jurisdiction." As the following analysis will indicate, however, the court need not address the issue of whether this court or the Ninth Circuit Court of Appeals has jurisdiction to review the validity of the issuance of the complaint, as the issuance of the complaint by the FTC is not a final agency action.

The district court normally lacks jurisdiction to review actions by a major federal agency. See Annotation, *Jurisdiction-Attack on FTC Action*, 16 ALR Fed 362 § 2[a] (1973). The usual procedure in FTC actions, as outlined in the Commission's Rules of Practice, 16 CFR § 3.12(a) and 15 U.S.C. § 21, is for the hearing to be held before an administrative law judge, whose decision may be appealed to the full Commission. The full Commission's ruling is directly appealable to the Court of Appeals, which may "affirm, enforce, modify or set aside orders of the Commission . . . ." 15 U.S.C. § 21(d). The statute provides that the jurisdiction of the Court of Appeals "shall be exclusive." 15 U.S.C. § 21(d).

The courts have crafted a number of exceptions to the general rule that the district court lacks jurisdiction to review the conduct of a federal agency. The district court has jurisdiction if the action of the agency violates the plaintiff's constitutional rights, *Boise Cascade Corp. v. F.T.C.*, 498 F.Supp. 772 (D. Del. 1980), or acts outside the scope of its authority, *Lone Star Cement Corp. v. F.T.C.* [1964 TRADE CASES ¶71,322], 339 F.2d 505 (9th Cir. 1964), or has unnecessarily delayed the administrative proceedings, *Coca-Cola Co. v. F.T.C.* [1972 TRADE CASES ¶73,998], 342 F.Supp. 670 (N.D. Ga. 1972).

Plaintiffs argue that the FTC is acting outside the scope of its legislative authority, in that Section 7 Clayton Act does not grant the FTC the power to challenge assets acquisitions by a not-for-

profit organization. Since this challenge is within the exception to the general rule, plaintiffs argue, this court has the authority to determine the validity of the FTC's investigation of the merger before the investigation is completed.

The issuance of the complaint, however, was not a "final agency action" under the Section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. §701(a)(2), and thus not subject to judicial review. Directly on point is the Supreme Court decision in *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980) (*Standard Oil*). In *Standard Oil*, the district court dismissed an action filed to obtain the withdrawal of an FTC issued complaint. The action was filed while the complaint was pending before an administrative law judge. The Ninth Circuit reversed, and held that the district court had the authority to determine the validity of the FTC's action, as the issuance of the complaint was a "final agency action" under §10(b) of the APA.

In reversing the Ninth Circuit, the Supreme Court held that the issuance of the complaint by the FTC was not a final agency action subject to any judicial review (whether by the district court or the court of appeals). *Id.* at 239. In reaching this conclusion, the Court noted that the issuance of the complaint was materially different from other agency activities have [sic] been viewed as "final" agency action. *Id.* at 239-40, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942). Rather, the issuance of the complaint was a "threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." *Standard Oil*, 449 U.S. at 241. The Supreme Court noted that the charged party still had the opportunity to challenge the original issuance of the complaint, as well as other issues, after the Commission issued its final order, and that the final order was not binding until after judicial review is complete or the opportunity to obtain judicial review has lapsed. *Id.* at 241. See also *North Carolina State Bd. v. F.T.C.*, 615 F.Supp. 1155 (1985); *Gifford-Hill & Co. v. F.T.C.*, 523 F.2d 730 (D.D.C. 1975).

In their moving papers, plaintiffs raise a number of arguments which the Supreme Court specifically rejected in *Standard Oil*. First, plaintiffs assert that with respect to the issue of the FTC's jurisdiction under the Clayton Act, plaintiffs need not further exhaust their administrative remedies because the exception to the exhaustion requirement is applicable. Yet, whether the plaintiffs have exhausted their administrative remedies does not determine the issue of finality. In rejecting a similar argument, the Supreme Court in *Standard Oil* stated: "By requesting the Commission to withdraw its complaint and by awaiting the Commission's refusal to do so, Socal may well have exhausted its administrative remedy as to the averment of reason to believe. But the Commission's refusal to reconsider its issuance of the complaint does not render the complaint a 'definitive' action." *Id.* at 232. Thus, even assuming the court was willing to accept the plaintiffs' position regarding the application of the exhaustion exceptions, the plaintiffs have failed to prove that the issuance of the complaint is a final action.

Second, plaintiffs repeatedly argue that they will be "irreparably injured" unless the court intervenes at this stage of the administrative proceedings, and as such the court should consider the issuance of the FTC complaint as a final agency action. The Supreme Court, however, rejected the argument that the burden of responding to the complaint is akin to a final agency action, pointing out that "[a]lthough this burden is certainly substantial, it is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." *Id.* at 242. Judicial intervention at this stage of the proceedings will only deny the agency an opportunity to correct its own mistakes, lead to piecemeal litigation, and essentially turn the "prosecutor into defendant before adjudication concludes." *Id.* at 242-43. Because the only impact the issuance of the complaint will have upon the plaintiffs is the "disruptions that accompany any major litigation," the court is unwilling to conclude that plaintiffs will be irreparably injured at this juncture.

Plaintiffs' attempt to distinguish *Standard Oil* from the instant case is also without foundation. Although the plaintiffs correctly

note that in *Standard Oil*, the charged party sought to challenge the issuance of the complaint for lack of evidence, this is a distinction without a difference. The Supreme Court's ruling was aimed at preventing piecemeal litigation and undue judicial intervention in on-going administrative investigations. Whether the charged party seeks to challenge the issuance of the complaint because the FTC lacked jurisdiction, lack of sufficient evidence to issue the complaint, or failed to properly comply with a provision in the relevant Code of Federal Regulations, the ultimate impact of the issuance of the complaint is the same: the charged party is burdened with the obligation to defend itself before the administrative agency. If this court accepted the plaintiffs' position, a charged party would be able to circumvent the *Standard Oil* ruling merely asserting a challenge to the proceedings on jurisdictional grounds.[2]

In line with the Supreme Court's instructions to interpret "pragmatically the requirement of administrative finality," this court is obligated to conclude that the issuance of the complaint against the plaintiffs does not constitute a final agency action. See *Bell v. New Jersey*, 461 U.S. 773, 779 (1983). A realistic and pragmatic view of any judicial intervention at this stage of the administrative proceedings will be extremely disruptive. Although plaintiffs will be required to defend the merger in question before an administrative body, plaintiffs are not precluded from asserting their jurisdictional objections before the administrative law judge, or the full Commission. In addition, the plaintiffs may always seek judicial review, raising this jurisdictional issue, at a later date. Because the issuance of the complaint is merely a "threshold determination that further inquiry is warranted," the court will

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[2] The ruling in *Sunkist Growers, Inc. v. F.T.C.*, 464 F.Supp. 302 (C.D. Cal. 1979), is of questionable merit in view of the Supreme Court's later holding in the *Standard Oil* decision. In *Sunkist Growers, Inc.*, the district court decided the merits of the charged party's objections to the Commission's failure to review a denial (by the ALJ) of their motion to dismiss the complaint. *Id.* at 306. In light of the clear instructions provided in the *Standard Oil* decision, a district court facing the same factual scenario would probably decline to intervene and decide the validity of the Commission's failure to review the ALJ's denial of the motion to dismiss.

decline to intervene at the present stage of the administrative proceedings. This decision is consistent with the general preference to postpone judicial review until final agency action. See *Southern Cal. Aerial Advertisers' Association v. F.A.A.*, 881 F.2d 672 (9th Cir. 1989); *Public Utilities Comm. of Oregon v. Bonneville Power Authority*, 767 F.2d 622, 628-30 (9th Cir. 1985); *Air California v. United States Department of Transportation*, 654 F.2d 616 (9th Cir. 1981).[3] Accordingly, and good cause appearing,

It Is Hereby Ordered that:

1. Plaintiffs' motion for a preliminary injunction is denied;

2. Defendant's motion to transfer this action to the Ninth Circuit Court of Appeals is denied;

3. Defendant's motion to dismiss the action is granted.

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[3] The *Athlone Industries, Inc. v. Consumer Product Safety Commission*, 707 F.2d 1485 (D.C. Cir. 1983) [sic], is distinguishable. First, contrary to the *Athlone* case, the Commission has not taken a definitive position. *Id.* at 1490 n. 30. Second, unlike the factual scenario in *Athlone*, the present case does not present "unique circumstances . . . which make the application of the exhaustion doctrine even more inappropriate." *Id.* at 1489. Third, unlike the jurisdictional issue presented in the *Athlone* case, it is not apparent that the FTC lacks jurisdiction over the merger in question.

APPENDIX H

OPINION OF THE NINTH CIRCUIT
AUGUST 13, 1990

UKIAH VALLEY MEDICAL CENTER,
a California not-for-profit corporation,
formerly known as Ukiah Adventist Hospital;
Adventist Health System/West,
a California not-for-profit corporation,
Plaintiff-Appellants,

v.

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

No. 90-15184

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted June 7, 1990.
Decided August 13, 1990.

Appeal from the United States District Court for the Northern District of California.

Before CANBY, NOONAN and RYMER, Circuit Judges.

RYMER, Circuit Judge:

Adventist Health System/West and its affiliated corporation, Ukiah Valley Medical Center, appeal from the district court's

order dismissing their action for declaratory and injunctive relief to restrain the Federal Trade Commission from proceeding with its complaint charging them with violations of § 7 of the Clayton Act, 15 U.S.C. § 18. They contend that the district court erred in determining that the FTC's issuance of an administrative complaint did not constitute "final agency action" and therefore was not subject to judicial review prior to the conclusion of administrative proceedings. We affirm.

I

Prior to July 1988, Ukiah Valley owned and operated a 43 bed hospital in Ukiah, California, and the Ukiah Hospital Corporation owned and operated Ukiah General Hospital, a 51 bed hospital, also located in Ukiah. Ukiah is a town of approximately 13,600 people. In July 1988, Ukiah Valley acquired substantially all the assets of Ukiah Hospital Corporation for approximately $5.6 million. AHS/West is a major interstate hospital chain; the board of directors for AHS/West is also the board of directors for its affiliated corporation, Ukiah Valley. Both Ukiah Valley and AHS/West are not-for-profit California corporations.

In November 1989, the FTC issued an administrative complaint, which charged that it had reason to believe that Ukiah Valley and AHS/West acquired over a ninety percent market share in the provision of acute hospital services in a significant geographic area in Mendocino and Lake Counties in northern California, in violation of § 7 of the Clayton Act, 15 U.S.C. § 18. On December 26, 1989, Ukiah Valley and AHS/West moved to dismiss the FTC complaint. On February 8, 1990, the ALJ granted the motion in part and denied it in part; he ruled that FTC complaint counsel had not met the burden of showing that pure asset acquisitions by not-for-profit corporations may violate § 7 of the Clayton Act, but also held that whether the effects of the transaction were "tantamount to a merger" under § 7, as alleged, could only be ascertained after discovery and a trial. The ALJ also determined that the issue of whether Ukiah Adventist's activities

were "in or affecting interstate commerce" was a fact-based question that could not be resolved prior to discovery.

Meanwhile, Ukiah Valley and AHS/West brought this action in the district court on December 19, 1989. They sought an emergency restraining order and expedited hearing of a motion for a preliminary injunction. On December 20, 1989, United States District Judge Thelton E. Henderson denied their motion for a temporary restraining order. On January 16, 1990, Judge Alfonso Zirpoli denied their motion for a preliminary injunction, and ruled that the issuance of the FTC complaint did not constitute "final agency action" under *FTC v. Standard Oil Co.*, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980), such that it is subject to judicial review in the district court.

II

We have jurisdiction of this appeal under 28 U.S.C. §§ 1291, 1292(a)(1) and 1294. The denial of the motion for a preliminary injunction will be reversed only if the district court abused its discretion or based its decision upon an erroneous legal standard or clearly erroneous finding of fact. *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 (9th Cir. 1989). A dismissal for lack of jurisdiction is reviewed de novo. *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 787 (9th Cir. 1986).

III

Ukiah Valley and AHS/West invoke Section 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, which provides, in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action

> or ruling not directly reviewable is subject to review on the review of the final agency action.

There is no provision making the FTC's issuance of an administrative complaint "reviewable by statute." Thus, the critical inquiry in this case is whether the issuance of the complaint constitutes "final agency action for which there is no other adequate remedy in a court." *Id.; see FTC v. Standard Oil Co.*, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980).

The district court correctly determined that the FTC's issuance of an administrative complaint did not constitute "final agency action" and that judicial review was therefore premature under *Standard Oil*. In *Standard Oil*, the Supreme Court held that "[b]ecause the Commission's issuance of a complaint averring reason to believe that [the plaintiff] has violated the [FTC] Act is not 'final agency action' under § 10(c) of the APA, it is not judicially reviewable before administrative adjudication concludes." 449 U.S. at 246, 101 S.Ct. at 496; *see also USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1508 (D.C. Cir. 1988) ("the mere issuance of an administrative complaint does not constitute final agency action.").[1]

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[1] Finality in administrative law is sometimes treated as an aspect of the doctrine of ripeness, and sometimes as an independent jurisdictional requirement:

> Problems of finality are in the area where the law of exhaustion joins or overlaps with the law of ripeness . . . . Finality may be a part of exhaustion, a part of ripeness, or a third subject; courts do not clarify the classification, for they need not.

4 K. Davis, *Administrative Law Treatise* § 26:10, at 458 (2d ed. 1983) (citation omitted), *quoted in Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 745 (D.C. Cir. 1987) (opinion of Williams, J.). Although finality is often treated as a subsidiary concept of ripeness, there is a critical distinction: "while exhaustion and ripeness are judge-made *prudential* doctrines, finality is, where applicable, a *jurisdictional* requirement." *Ticor Title*, 814 F.2d at 746 (opinion of Williams, J.) (citations omitted) (emphasis in original). Therefore, a finding of finality, or of an applicable exception, is essential when the court's reviewing authority depends on one of the many statutes permitting appeal only of "final" agency action, such as § 10 of the APA, 5 U.S.C. §704. *See id.; see also Standard Oil*, 449 U.S. at 238, 101 S.Ct. at 492.

The general rule is that administrative orders are not final and reviewable "unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948), *quoted in Air Cal. v. United States Dep't of Transp.*, 654 F.2d 616, 621 (9th Cir. 1981). When an action is not a "definitive" statement of the FTC's position and does not have a "direct and immediate . . . effect on the day-to-day business" of the subject party, it is not "final." *Standard Oil*, 449 U.S. at 239, 101 S.Ct. at 492; *see also Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) ("the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . ."). Other relevant factors include whether the order has the status of law or comparable legal force, and whether immediate compliance with its terms is expected. *See Standard Oil*, 449 U.S. at 239-40, 101 S.Ct. at 493. The FTC complaint in this case does not satisfy these indicia of finality.

The fact that the FTC voted to issue the complaint does not in itself constitute a definitive determination by the agency that it has jurisdiction. The jurisdictional issue is still pending before the ALJ and may be resolved in favor of Ukiah Valley and AHS/West. Indeed, the ALJ ruled on February 8, 1990 that the asset acquisition clause of § 7 of the Clayton Act is not a basis for FTC jurisdiction over this transaction.[2]

The issuance of the complaint requires only that Ukiah Valley and AHS/West appear and defend themselves in the administrative adjudicatory proceedings. Such a burden has consistently been held not to constitute a "direct and immediate . . . effect on the day-to-day business" of charged parties. *See Standard Oil*, 449 U.S. at 239, 242-44, 101 S.Ct. at 494-95; *USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988); *see also*

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[2] The ALJ ruled that whether FTC jurisdiction was proper based on other clauses of § 7 could not be determined without further discovery and a trial.

California ex rel. Christensen v. FTC, 549 F.2d 1321, 1323 (9th Cir.), *cert. denied*, 434 U.S. 876, 98 S.Ct. 227, 54 L.Ed.2d 156 (1977) ("litigation expenses, however substantial and nonrecoverable, which are normal incidents of participation in the agency process do not constitute irreparable injury" and therefore are insufficient to "permit judicial intervention in the agency process."). Nor does mere "possible financial loss" have such an effect. *See California Dep't of Educ. v. Bennett*, 833 F.2d 827, 834 (9th Cir. 1987).[3]

Ukiah Valley and AHS/West are not yet subject to any order requiring them to act. Should the FTC, at the conclusion of the administrative proceedings, issue a final order, they can at that time obtain judicial review and challenge the issuance of the complaint as well as the agency's jurisdiction. Such a final order is not binding until after judicial review is complete or the time allowed for judicial review has expired. *See* 15 U.S.C. § 21; *Standard Oil*, 449 U.S. at 241-43, 101 S.Ct. at 493-95.[4]

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[3] Apart from the burden of appearing and defending in the administrative proceeding, there is no substantial evidence of a "direct and immediate effect" upon daily business resulting from issuance of the FTC complaint. Ukiah Valley and AHS/West offer only a conclusory statement by the President of Ukiah Valley Medical Center, that

> [t]he pendency of the FTC investigation and the threat of divestiture create a cloud of uncertainty that hurts Ukiah Valley in physician recruitment, hiring nurses and staff, undertaking certain consolidation efforts, capital expenditures, facilities planning and the provision of higher quality medical care.

Devitt Affidavit, ¶ 35.

[4] Following discovery, an evidentiary hearing, and the submission of briefs, the ALJ issues an initial decision. 16 C.F.R. § 3.51. Either side may appeal the ALJ's decision to the full Commission, or the Commission may docket the initial decision for review *sua sponte*. 16 C.F.R. §§ 3.52, 3.53. The Commission then enters its own decision. 16 C.F.R. § 3.54. If the Commission finds a violation of law, it may enter an order to divest and for other appropriate relief. 15 U.S.C. § 21(b). Under the Clayton Act, this order is subject to review in the court of appeals. 15 U.S.C. § 21(c). "Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission, board, or Secretary shall be exclusive." 15 U.S.C. § 21(d). Any order the Commission issues does not take effect until judicial review is

Ukiah Valley and AHS/West contend that the FTC has in fact reached a definitive position on its jurisdiction, because it has refused three times to accept their arguments that jurisdiction is lacking. In addition to issuing the complaint, they point to FTC Commissioner Calvani's letter ruling, subsequently adopted by the full Commission, which refused to quash the subpoena *duces tecum* served upon AHS/West despite jurisdictional objections, and to a recent address by FTC Chairman Janet Steiger mentioning the Ukiah transaction and stating "the Commission's general view that mergers by non-profit hospitals also have the potential for impairing competition and consumer welfare, and may properly be subject to antitrust scrutiny under the Commission's statutory authority."

We agree with the FTC that neither action is dispositive. The Calvani letter ruling cannot be considered definitive because it explicitly refused to consider the merits of the jurisdictional issues raised in the petition to quash, noting that such issues were raised prematurely as defenses to investigative subpoenas. *See EEOC v. Children's Hosp. Medical Center*, 719 F.2d 1426, 1427-30 (9th Cir. 1983) (en banc); *Civil Aeronautics Board v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952 (D.C. Cir. 1979). Commissioner Steiger's statement likewise does not purport to be the last word of the FTC on this case. Indeed, the ALJ's recent ruling that the FTC lacks jurisdiction under the assets acquisition clause of § 7 indicates that the issue is very much alive.

IV

Ukiah Valley and AHS/West argue that this case is not controlled by *Standard Oil*, but rather by three District of Columbia Circuit Court of Appeals opinions which, they contend, are authority for the proposition that the filing of an administrative complaint constitutes "final agency action" on the question of whether the agency thinks it has jurisdiction, such that the

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complete, or the time allowed for judicial review has expired. 21 U.S.C. § 21(g).

jurisdictional question is reviewable in federal court sooner rather than later. *See Athlone Indus. Inc. v. Consumer Product Safety Comm'n*, 707 F.2d 1485, 1489-90 n. 30 (D.C. Cir. 1983) ("By filing a complaint in the present case, the Commission, for all practical purposes, made a final determination that such proceedings were within its statutory jurisdiction."); *see also Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 744 (D.C. Cir. 1987) (opinion of Edwards, J.) ("*Athlone* . . . held that the filing of an administrative complaint constituted a 'final,' judicially-reviewable determination that the agency had the authority to conduct an enforcement proceeding.") (citing *Athlone*, 707 F.2d at 1489-90 n. 30); *Atlantic Richfield Co. v. United States Dep't of Energy*, 769 F.2d 771, 783 (D.C. Cir. 1985) ("ARCO") (quoting *Athlone*, 707 F.2d at 1489-90 n. 30); *cf. USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1508 (D.C. Cir. 1988) ("the mere issuance of an administrative complaint does not constitute final agency action."). We disagree.

In *Athlone*, upon which the two subsequent opinions rely, the agency brought a civil penalty action in an administrative proceeding before an ALJ; the charged party brought suit in the district court to enjoin the administrative proceedings. The district court dismissed for failure to exhaust administrative remedies. The court of appeals reversed the exhaustion dismissal, but ruled for the agency on other grounds. Finality was discussed only in a footnote, in the context of whether administrative remedies had been exhausted. *See* 707 F.2d at 1489-90 n. 30; *cf. Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-93, 105 S.Ct. 3108, 3119-20, 87 L.Ed.2d 126 (1985) ("The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable."). The court considered the fact that the agency issued the complaint as one of several factors which demonstrated that exhaustion would be futile, along with the agency's defense of the challenged position in previous litigation and the unanimous ruling of the Commission following oral argument that it had the authority to undertake the challenged action. Because these other

factors are not present in this case, and because finality rather than exhaustion is at issue here, *Athlone* is not persuasive.

Neither is the opinion of Judge Edwards in *Ticor Title* persuasive. The three judges on the *Ticor Title* panel agreed that the plaintiff's district court action to enjoin ongoing FTC proceedings on the ground that the authorizing statute was facially unconstitutional was premature, but were unable to agree upon the reason. In separate opinions, Judge Edwards determined that the plaintiff's action was premature due to failure to exhaust administrative remedies, 814 F.2d at 732-45, Judge Williams found judicial review premature because the agency action was not final, *id.* at 745-50, and Judge Green decided that the plaintiff's claim was not ripe for review, *id.* at 750-58. Judge Edwards cited to *Athlone* and *ARCO* in rejecting Judge Williams' position that the agency action was not final. Because Judge Edwards concluded that the plaintiff's action was premature due to failure to exhaust administrative remedies, his brief statement regarding finality was not necessary to his holding or to the court's disposition of the case.

In *ARCO*, the Atlantic Richfield Company brought suit in district court challenging the Department of Energy's statutory powers to adjudicate price-control controversies and to impose discovery sanctions. The Department had promulgated a regulation providing for imposition of the contested sanctions in appropriate cases, and had subjected ARCO to adjudicatory proceedings under that regulation. 769 F.2d at 774-75, 780-81 & n. 56. The court of appeals determined that that administrative action was sufficiently final for review under the doctrines of ripeness and administrative exhaustion; it did not address finality as a jurisdictional issue. *See* 769 F.2d at 781 n. 63; *see also Ticor Title*, 814 F.2d at 748 & n. 5 (opinion of Williams, J.); *cf. Gulf Oil Corp. v. United States Dep't of Energy*, 663 F.2d 296, 310 (D.C. Cir. 1981) (where finality requirement of 5 U.S.C. § 704 does not apply, court may "as a prudential matter refrain from reviewing nonfinal agency action"), *cited in ARCO*, 769 F.2d at 781 n. 63. Unlike *ARCO*, in this case "final agency action" is a jurisdictional requirement imposed by statute, *see* 5 U.S.C. § 704, and we cannot say that the FTC has, for all practical purposes, made a

final determination that these proceedings are within its jurisdiction[5] or that there are compelling reasons for interlocutory review.

AFFIRMED.

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[5] Because the issuance of the administrative complaint does not constitute "final agency action" subject to immediate judicial review, we need not decide whether Ukiah Valley and AHS/West have exhausted their administrative remedies. Decisions of this Circuit, rather than the *Athlone* line of cases, are controlling on the exhaustion issue. *Lone Star Cement Corp. v. FTC*, 339 F.2d 505, 509-12 (9th Cir. 1964), involved a challenge to the FTC's jurisdiction over a portion of the conduct charged in its administrative complaint as violating § 7 of the Clayton Act. We determined that the plaintiff's effort to obtain judicial relief against anticipated agency action was premature; the plaintiff must wait for the initial hearing examiner to decide the issue, and then must follow the normal procedure for appeals of FTC decisions. "Except in very unusual and limited circumstances," a plaintiff must proceed through the established administrative process, "notwithstanding the fact that the Commission has apparently three times taken a position contrary to that taken by [the plaintiff]." 339 F.2d at 510 & n. 9. *See also California ex rel. Christensen v. FTC*, 549 F.2d 1321 (9th Cir.), *cert. denied*, 434 U.S. 876, 98 S.Ct. 227, 54 L.Ed.2d 156 (1977) (suit in federal district court seeking to enjoin FTC administrative proceedings because FTC had no jurisdiction over plaintiffs and over challenged transaction premature under *Lone Star* because plaintiffs failed to exhaust administrative remedies).

APPENDIX I

DECISION AFTER TRIAL OF JUDGE PARKER
DECEMBER 9, 1992

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	
ADVENTIST HEALTH SYSTEM/WEST, a corporation,	
and	DOCKET NO. 9234
UKIAH ADVENTIST HOSPITAL, a corporation,	

INITIAL DECISION

Lewis F. Parker, Administrative Law Judge:

I. HISTORY OF THE PROCEEDING

On November 7, 1989, the Commission issued a complaint charging that Adventist Health System/West ("AHS/West") and Ukiah Adventist Hospital ("Ukiah Adventist") had acquired Ukiah General Hospital ("UGH") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

The complaint alleges that AHS/West, a nonprofit religious corporation which establishes, manages, and maintains acute care hospitals in the western United States, controls Ukiah Adventist, the operator of a hospital facility called Ukiah Adventist Hospital ("UAH"), which is located in Ukiah, California.

the operator of a hospital facility called Ukiah Adventist Hospital ("UAH"), which is located in Ukiah, California.

The complaint further alleges that on or about July 29, 1988, Ukiah Adventist agreed with Ukiah Hospital Corporation ("UHC"), a wholly owned subsidiary of HealthTrust, Inc. ("HealthTrust"), to purchase substantially all of the assets of UHC, including UGH, an acute care hospital also located in Ukiah, California. The transaction was consummated on August 8, 1988.

According to the complaint, the acquisitions of UGH by AHS/West and Ukiah Adventist increased the market share of AHS/West in the southeastern Mendocino/Lake County area from approximately 38 percent to 71 percent, and the HHI from approximately 3100 points to 5600 points. In the southeastern Mendocino county area, the HHI allegedly increased from approximately 4340 points to 8580 points.

The complaint concludes that the effect of the acquisition of UGH by AHS/West and Ukiah Adventist may be substantially to lessen competition or tend to create a monopoly in the relevant markets.

Shortly before trial began, complaint counsel moved for partial summary decision, and I ruled in their favor on several issues. Specifically, I found in my July 6, 1992, order that:

1. The interstate commerce requirements of Section 7 of the Clayton Act are satisfied.
2. Respondent AHS/West is properly named as a respondent.
3. The market share of Frank R. Howard Memorial Hospital in Willits, California, is attributable to respondents.
4. Respondents cannot sustain their burden of establishing a "failing firm" defense.

Trial began on July 13, 1992, in San Francisco, California. It ended on July 24, 1992. On September 4, 1992, respondents filed an offer of proof with respect to their rejected failing firm defense. After complaint counsel filed their reply to the offer of proof, I closed the record on September 25, 1992. The parties

filed their proposed findings of fact and conclusions of law on September 25, 1992. Answers were filed on October 30, 1992.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the facts or because they are irrelevant.

II. FINDINGS OF FACT

A. The Respondents

1. AHS/West

1. AHS/West is a nonprofit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business in Roseville, California (Ans ¶ 2; Tr. 337, 342, 346).[1] AHS/West manages and controls 18 nonprofit hospitals, including respondent UAH, in California, Hawaii, Oregon, Utah, and Washington (CX-13A-3, A-4, A-10 to A-19). The combined patient revenues of the AHS/West hospital system were more than $600 million in 1990 (*Id.*, A-5). AHS/West is affiliated with the Seventh-Day Adventist Church which has been involved in health care since approximately 1863 (Tr. 344).

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[1] Abbreviations used in this decision are:

Ans:	Answer	Tr.:	Transcript of the proceeding
CPF:	Complaint Counsel's proposed findings	F:	Finding of fact
RPF:	Respondents' proposed findings	SD:	Partial Summary Decision of July 6, 1992
CX:	Commission Exhibit		
RX:	Respondents' Exhibit		

2. Ukiah Adventist

2. Ukiah Adventist is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business in Ukiah, California (Ans ¶ 4). Prior to the acquisition, it operated UAH, a 43-bed general acute care hospital (CX-4-A, ¶ 25; Cal. Health & Safety Code § 1250(a), (Deering 1990)) at 275 Hospital Drive, Ukiah, California.

B. The Acquisition

3. HealthTrust is a Delaware corporation with its executive offices located in Nashville, Tennessee (CX-4-B, ¶ 30; CX-64-C). Prior to the acquisition, HealthTrust was the sole shareholder of UHC, a California corporation which operated UGH, a 51-bed general acute care hospital in Ukiah, California.

4. In 1988 HealthTrust and its subsidiaries owned and operated 95 general acute care hospitals with 13,232 licensed beds in 21 states (CX-4-B, ¶ 32; CX-64-B). HealthTrust had $1,666,102,000 in net operating revenues for the year ending August 31, 1988 (CX-64-J).

5. On July 29, 1988, UAH entered into an agreement with UHC for UAH to purchase substantially all of the assets of UGH, excepting only accounts receivable, for approximately $5.9 million (Ans. ¶ 10; CX-6-G). AHS/West initially proposed the acquisition to HealthTrust in October 1987 (SD ¶ 13) and it negotiated the July 29, 1988, agreement on behalf of UAH, served as guarantor of UAH's obligations under this agreement, and ratified the agreement by vote of its Board of Directors (SD pp. 9-11; Ans. ¶ 11; CX-6-Z-4; CX-9). On August 8, 1988, respondents acquired UGH pursuant to the July 29, 1988 agreement (CX-7; CX-8; Tr. 1049).

6. Respondents' purchase of UGH from UHC was part of a three-party transaction. This transaction involved (a) AHS/West purchasing UGH from HealthTrust for $5.9 million; (b) Health-Trust purchasing Scott Memorial Hospital, a 64-bed hospital in

Lawrenceburg, Tennessee, from Adventist Health System/Sunbelt ("AHS/Sunbelt") for $1.2 million; and (c) AHS/West agreeing to pay AHS/Sunbelt $400,000 plus a share of UAH's profits for the following ten years (CX-19-A; CX-20-C; Tr. 380-82, 409-11; *see also* RX-306-I-L; RX-311-F-G). In 1991, respondents paid AHS/Sunbelt $1.675 million to resolve the remaining obligations under their agreement with AHS/Sunbelt (CX-29-B; Tr. 382, 421).

7. The total cost to respondents of acquiring UGH was $7.975 million, including $5.9 million paid to HealthTrust, $400,000 paid by respondents to AHS/Sunbelt at the time of the transaction, and $1.675 million paid by respondents to AHS/Sunbelt in 1991 (CX-20-C; CX-29-B; Tr. 382, 421).

8. UAH, now known as Ukiah Valley Medical Center ("Ukiah Valley"), has, since August 1988, operated as a 94-bed acute care general hospital in Ukiah (Tr. 338, 1050; CX-32-D).

C. Hospitals In Ukiah Prior To The Acquisition

9. Prior to August 1988, there were three acute care general hospitals in Ukiah: Ukiah Valley (43 beds), then known as UAH, UGH (51 beds) and Mendocino Community Hospital ("Mendocino Hospital") (56 beds) (Tr. 182, 1050, 1203; RX-30-W). These hospitals were quite small compared to others in the hospital industry (Tr. 1050).

10. Prior to the acquisition, UAH and UGH had a 50-60 percent occupancy rate (Tr. 1052; RX-353-O); Mendocino Hospital's occupancy rate for the 1987-88 fiscal year was 15.7 percent (RX-110-A).

11. When Ann Mahoney assumed her duties as administrator of Mendocino Hospital in 1987, it was in poor financial condition; it had a deficit of approximately $325,000 to $350,000 a year (Tr. 180). Mendocino Hospital no longer operates (Tr. 204, 206-07).

12. From 1985 to 1988, the Ukiah hospitals experienced a significant drop in total occupancy. In 1985, they had a total average occupancy of 51.4 percent; by 1988 the rate had dropped to 40.9 percent (RX-362-R). One reason for the decline was the increased use of outpatient facilities by patients (Tr. 358, 1053).

13. Along with decreasing admissions, these three hospitals were also experiencing decreasing lengths of stay (Tr. 357-60). Utilization review was an important factor in decreasing length of stay (Tr. 357-58).

14. Approximately 45 percent of Ukiah Valley's patients are Medicare patients and approximately 20 percent are Medi-Cal patients (Tr. 1058, 1062; RX-302). Medi-Cal is a program administered in the State of California to provide health care for indigents or low-income families (Tr. 1062). This adverse patient mix hurts the hospital financially (Tr. 560-62) and makes it difficult to recruit physicians to the Ukiah area (Tr. 1054; RX-13) because of the low Medicare and Medi-Cal reimbursement (Tr. 466-67, 1054-55). Because of the chronic nursing shortage, it is difficult for small, rural hospitals to attract nurses (Tr. 933-34).

15. In September 1987, when HealthTrust, Inc., first acquired UGH, its pre-tax, pre-management fee earnings were a loss of $190,000 (RX-314-O). UGH's net income for September 1987 was a loss of $199,514 (RX-314-O).

16. In December 1987, after four months under HealthTrust's ownership, UGH had a negative year to date cash flow of $7,921,772 (RX-286-F; RX-314-T). UGH had a negative year to date net income of $268,308 (RX-314-U). For just the month of December 1987, UGH had a negative cash flow of $150,901 (RX-314-T). UGH laid off several employees in 1988 (Tr. 1202, 1208-09).

17. While the monthly figures demonstrate heavy losses, HealthTrust officials testified that the yearly figures are the best indication of UGH's financial position (RX-311-Z-2, Z-3; RX-311-Q, R). By August 7, 1988, UGH had a year to date operating income loss of $562,467 and a loss of net income of $669,281 (RX-127-D; Tr. 1221). Mr. Robert Hornichek of HealthTrust referred to UGH's losses as "out of sight," with $6 million in long term debt and negative stockholder equity (RX-314-Z-5-6).

18. UGH lost significant amounts of money on Medicare and Medi-Cal patients (Tr. 1216-17).

19. UGH also needed major renovations. Mr. ValGene Devitt, President of Ukiah Valley, testified that immediately after the acquisition, he made an inspection of UGH (Tr. 1068). He discovered that its carpet was in extremely bad condition (Tr. 1068; *see also* Tr. 1207). Other problems included a malfunctioning main air-conditioning unit (Tr. 1068) and a standby generator (Tr. 1068-69). Mr. Devitt also discovered that a $50,000 to $100,000 sprinkler system would have to be added to the UGH facility (Tr. 1069).

20. According to Mr. Leon W. Hooper, a vice-president of HealthTrust:

> UGH and HealthTrust determined that, given UGH's financial decline and UGH and HealthTrust's unwillingness to invest additional significant capital, sale or other disposition of UGH was the only viable alternative to respond to the Hospital's continuing financial decline.

(RX-131-B).

21. Ms. Jamie Hopping, who was the administrator of UGH for six months in 1988 (Tr. 1202), was optimistic about its future while she was there (Tr. 1207-08) but she was not aware of Mr. Hooper's opinion with regard to UGH's financial condition (Tr. 1227).

22. Several Ukiah physicians and health care professionals testified that Ukiah could support only one hospital (RX-308-H; RX-312-D; RX-314-Z-12; RX-373-Z-4; Tr. 631-32, 1345-46, 1670, 1699), and that UAH and UGH unnecessarily duplicated services and equipment (Tr. 1431-32, 1450-51). Dr. Guthrie, a surgeon and a member of UAH's governing board, described the results of what has been called a medical arms race:

> Q. Doctor, prior to the August 1, 1988 in favor of Ukiah Valley purchasing the assets of Ukiah General Hospital, were you in favor of that purchase?
>
> A. Yes.
>
> Q. What was the basis of your opinion?
>
> A. Well, that's a --
>
> Q. That's a big question.

A. It's a big step to take, you know, to take the risk of, financial risk, of buying a business when you've got one going. But I've seen, in my years here, I've seen so much waste of effort and money and duplication of services. And, at the risk of prolonging this, it seems back beyond these two hospitals, to when we had three. There was even more duplication, then. Every time one would get a CT Scanner, or something like that, in order to stay in the market and be a full-service hospital, one would have to catch up with the other. It just went back like that, see-saw back and forth. And it just -- it was apparent -- it is apparent to me that, in a town of this size, that one hospital is plenty. If you have two or three hospitals of 40 beds, having to duplicate services, then, there is a lot of waste.

(RX-312-C-D).

Dr. Jepson, another Ukiah physician, stated:

Q. Prior to the acquisition now, did you have an opinion that Ukiah only needed or could only support one viable, acute care general hospital?

A. I've thought for 17 years that that's a town that needs one hospital.

Q. And why --

A. Small hospitals is crazy, and two hospitals is not smart, and one is the way to go. I've always thought that.

Q. Why do you have that opinion? What's the basis for that opinion, if you can be a little more specific?

A. Well, if you have two 40-bed hospitals, they're not efficient. If you have specialty groups trying to practice in both hospitals, they're competing with one another, trying to duplicate services. This hospital gets a CAT scan, that hospital has to have a CAT scanner. This hospital gets orthopedic equipment, that hospital has to have orthopedic equipment.

And there are inefficiencies in small size. There are inefficiencies in the delivery of care from a physician's standpoint. It's hard to take care of sick patients in two places. It's just a matter of efficiency.

(Tr. 1431).

D. The Relevant Product Market

23. Dr. Glenn Melnick, complaint counsel's economic expert, testified that the appropriate product market in which the effect of this acquisition should be measured consists of a product or service, or a group of products or services, for which a monopolist could profitably sustain a small but significant and nontransitory price increase (Tr. 708).

24. Whether a price increase can be profitably sustained depends upon the degree to which consumers may, in response to that increase, switch to alternative products or services (Tr. 707-08). Substitutability of an alternative product or service is determined by finding to what extent a change in the price of one good or service might impact the demand for another good or service (Tr. 707-08).

25. Dr. Melnick determined substitutability by analyzing patient origin data compiled by the California Statewide Office of Health Planning and Development ("OSHPD"), planning documents from hospitals in the market (Tr. 875), the range of services California law permits under inpatient and outpatient status (Tr. 707-08, 815), and opinions in previously litigated hospital merger cases (Tr. 708-09).

26. After considering this evidence, Dr. Melnick concluded that the relevant product market in this proceeding is acute care inpatient hospital services (Tr. 709-10).

27. The types and intensity of services required by a patient distinguish inpatient and outpatient care. Inpatients need 24-hour nursing care, laboratory services, intensive monitoring, and the services provided by intensive care or coronary care units. Inpatients are often treated with procedures that involve the risk of bleeding or infection, and may require complicated surgical or orthopedic-procedures, blood bank or x-ray services and specialized nursing care (Tr. 100-01, 260-61, 468-69, 550, 630-31, 709, 921-22, 956, 970-71, 1018, 1026-27, 1258-59, 1266-67, 1321, 1471; Cal. Health & Safety Code § 1259(a) (Deering 1990)).

28. Dr. Melnick recognized that there is some substitutability between inpatient and outpatient services, but he concluded that they were nevertheless distinct product markets (Tr. 705).

29. Dr. Lynk, respondents' expert, agreed that most economists who study the hospital industry consider inpatient acute care services as the product definition most relevant for analysis of hospital competition (Tr. 1584-85; Lynk, Antitrust Analysis and Hospital Certificate-of-Need Policy, *Antitrust Bulletin* 61, 74-75 (Spring 1987)) and he adopted acute care inpatient hospital services as the product market in his analysis of the acquisition because "it makes some analytical sense only to look at that part of the hospital's activity" although limiting one's analysis to inpatient care facilities ignores some "linkage" between inpatient and outpatient care (Tr. 1474-75).

30. Other record facts confirm the experts' opinion. California law does not permit outpatient surgical facilities to treat patients who require overnight hospitalization, except for 13 postsurgical demonstration projects (Cal. Health & Safety Code §§ 1240(b)(1), 1250.9 (Deering 1990); CX-100-F).

31. Third-party payors are unwilling to pay for inpatient care if outpatient care would have been sufficient, forcing hospitals to develop review programs to determine whether inpatient care is necessary (Tr. 550-51). This type of program recognizes the essential difference between inpatient and outpatient care.

32. A UAH document, its 1989 strategic plan, states that its increased volume in outpatient services came "at the expense of other outpatient programs in the area." Inpatient programs were not mentioned (CX-175).

33. Dr. Melnick conceded that changes in technology allow physicians to perform what were inpatient procedures on an outpatient basis (Tr. 818) and physicians testifying in this proceeding listed several procedures which can be performed in an outpatient setting (Tr. 111, 292, 567, 919-21, 956, 1004, 1026-27, 1231). Also, Mr. Devitt testified that outpatient providers compete for Ukiah Valley's patients (Tr. 1108, 1114; *see also* Tr. 1011-12). Nevertheless, there is no doubt that there are many procedures which can only be performed in an inpatient setting in acute

care hospitals and only hospitals offering these procedures compete for patients needing those procedures.

E. The Relevant Geographic Markets

1. Ukiah And Surrounding Towns

34. Ukiah, California, is located in the southeastern part of Mendocino County, and is its county seat and largest city; it has a population of approximately 13,000 (Tr. 1050; CX-16-B; CX-65-Z-1; RX-30-Z-140; RX-335; RX-392). The nearest town with an acute care hospital is Willits, approximately 23 miles north of Ukiah on Highway 101 (CX-16-B; RX-30-Z-140). Ukiah, Willits, and other communities in eastern Mendocino County are separated from the coastal regions of Mendocino County by the mountains of the Coast Range, which inhibit travel between those areas (RX-112-G). Lakeport, in western Lake County, is approximately 34 miles southeast of Ukiah over a two-lane highway through the inner ranges of the Coast Range (RX-30-Z-140; RX-392). The town of Clearlake is separated from the western part of Lake County by Clear Lake (RX-392).

35. The nearest urban area to Ukiah is Santa Rosa, in Sonoma County, approximately 60 miles south on Highway 101, a combination two-lane and four-lane highway (CX-16-B; RX-30-Z-140; RX-335; RX-393; Tr. 1136-37). San Francisco is approximately 52 miles farther south from Santa Rosa, and 120 miles from Ukiah over Highway 101 (CX-13-A-18; RX-392).

2. Hospitals In Complaint Counsel's Proposed Relevant Geographic Markets

36. Prior to the acquisition, UAH was a 43-bed general acute care hospital, located at 275 Hospital Drive, Ukiah, California. It provided primary-level pediatric care, medical/surgical care, an emergency room, and ancillary services such as radiology and a laboratory (Tr. 1050; CX-15-Z-14; *see also* CX-13-A-18). Prior to the acquisition, UAH did not have an obstetrical unit (Tr. 360,

1204; RX-309-I; CX-16-H), nor did it offer complex medical care such as neurosurgery, open-heart surgery, or organ transplants (Tr. 332, 916-17, 988-89, 1029, 1183, 1688-89). The gross patient service revenue for UAH in 1987, the year prior to the acquisition, was more than $15 million (RX-30-Z-128).

37. Prior to the acquisition, UGH was a 51-bed general acute care hospital, located at 1120 South Dora Street, Ukiah, California, which provided primary-level obstetrical, pediatric, medical/surgical care, an emergency room, and ancillary services such as radiology and a laboratory (Tr. 1050, 1235; RX-316-M). UGH did not offer complex medical care such as neurosurgery, open-heart surgery, and organ transplants (RX-316-I; Tr. 916-17, 988-89, 1029). UGH had the only obstetrical unit and the only level II neonatal intensive care nursery in Ukiah and thus had approximately 93 percent of the Ukiah obstetrical market (Tr. 105-07, 360, 1204; CX-15-Z-14; CX-16-B; CX-65-Z-46; CX-66-C; RX-126-B). The gross patient service revenue for UGH in 1987, the year prior to the acquisition, was more than $12.9 million (RX-30-Z-122).

38. Following the acquisition, respondents have continued to operate a 94-bed hospital on the UGH and UAH campuses under the name Ukiah Valley Medical Center (CX-13-A-18; RX-4-C; Tr. 359). The former UAH facility is referred to as the Hospital Drive campus, while the former UGH facility is referred to as the Dora Street campus (RX-393; Tr. 116).

39. Frank R. Howard Memorial Hospital ("Howard Hospital"), a 38-bed hospital located in Willits, is owned by the Frank R. Howard Memorial Foundation, which leases it to Willits Hospital, Inc., a wholly-owned subsidiary of Western Health Resources, an affiliate of respondent AHS/West (SD ¶ 20). Howard Hospital is approximately 23 miles north of Ukiah (RX-30-Z-140). AHS/West has the ability to, and does, direct and control the policies and operations of Howard Hospital (SD ¶ 21). The market share of Howard Hospital is attributable to respondents (SD p. 19).

40. Prior to the acquisition, Mendocino County owned and operated Mendocino Hospital, a 56-bed hospital located in Ukiah (Tr. 182; RX-30-Z-24, Z-140). In 1990, Mendocino Hospital

ceased offering inpatient hospital services and, in 1992, it closed its outpatient operations as well (Tr. 203-04, 206-07, 359; RX-119). Mendocino County has recently announced plans to convert the hospital into a county administrative and health services office complex (Tr. 204-06).

41. Lakeside Community Hospital ("Lakeside") is a 63-bed hospital located in Lakeport, Lake County (CX-48-A-B, D), approximately 34 miles southeast from Ukiah and approximately 60 miles from Santa Rosa (RX-30-Z-140; RX-392). It provides primary level surgical and medical care (CX-48-D). It does not provide complex medical care, such as neurosurgery, open-heart surgery and organ transplants (CX-48-D).

42. The nearest hospitals that provide complex inpatient services not offered by UGH, UAH, Howard Hospital and Lakeside are Santa Rosa Memorial Hospital ("SRMH") and Santa Rosa Community Hospital ("SRCH").

3. Hospitals In Areas Surrounding The Proposed Relevant Geographic Markets

43. SRMH is a 225-bed hospital located in Santa Rosa, approximately 68 miles from Ukiah (CX-58-A-B; RX-30-Z-140; RX-335). It offers specialized procedures not available in Ukiah, including open-heart surgery, neurosurgery, thoracic surgery, renal surgery, and cancer treatment (Tr. 988-89, 1029; CX-58-C-J).

44. SRCH is a 145-bed hospital located in Santa Rosa, approximately 68 miles from Ukiah (CX-54-C; RX-30-Z-140; RX-335). It offers specialized procedures not available in Ukiah, including neurosurgery, thoracic surgery, and cancer treatment (CX-57-K, T, Z-3, Z-5; Tr. 553, 558).

45. Mendocino Coast District Hospital ("MCDH") is a 54-bed hospital located in Fort Bragg, Mendocino County (CX-51-A-B), 58 miles across the Coast Range from Ukiah (RX-30-Z-140; RX-335). Geographic distance and physical boundaries separate Fort Bragg from Ukiah and Willits (RX-111-G). Like the hospitals in complaint counsel's proposed relevant geographic markets, MCDH provides only primary services, and does not provide complex

services such as neurosurgery, open-heart surgery, or organ transplants (RX-112-G).

4. Elzinga-Hogarty Analysis
Of Patient Discharge Data

46. Dr. Melnick determined the boundaries of the relevant geographic markets -- the areas in which a monopolist could profitably sustain a small but significant and nontransitory price increase (Tr. 718) -- for acute care inpatient hospital services by analyzing 1987 patient discharge data (the last full year before the challenged acquisition) for hospitals located in several potential geographic markets (CX 86) according to the so-called Elzinga-Hogarty test.

47. The Elzinga-Hogarty test produces two numerical measures of the strength of a tested area as an appropriate geographic market. The first measure is LOFI or "little out from inside," which in this case measures the movement -- or "leakage" -- of residents from outside the proposed market to hospitals inside the proposed market. A LOFI of 100 would indicate that all patients at the hospitals in the proposed market resided in that market. The second measure is LIFO or "little in from outside," which in this case measures the "leakage" of residents from inside the proposed market to hospitals outside the proposed market. A LIFO of 100 would indicate that all patients who resided in the proposed market sought hospitalization in that market (Tr. 738-39, 1498-99; Elzinga & Hogarty, *The Problem of Geographic Market Delineation Revisited: the Case of Coal*, 23 Antitrust Bull. 1 (1978); Elzinga & Hogarty, *The Problem of Geographic Market Delineation in Antitrust Suits*, 18 Antitrust Bull. 45 (1973)).

48. Under the Elzinga-Hogarty test, a recognizable, but weak, market is attained when both LOFI and LIFO statistics reach 75 percent. A market is characterized as strong if both LOFI and LIFO reach 90 percent (Tr. 742-44; Elzinga & Hogarty, *The Problem of Geographic Market Delineation Revisited: the Case of Coal*, 23 Antitrust Bull. 1 (1978); Elzinga & Hogarty, *The Problem of Geographic Market Delineation in Antitrust Suits*, 18

Antitrust Bull. 45 (1973)). In evaluating Elzinga-Hogarty data, smaller markets are preferred to larger markets with similar LOFI and LIFO figures (Tr. 746-47). Dr. Melnick used ZIP codes to analyze patient discharge data because they are the smallest unit by which California collects patient origin data (Tr. 724, 782-83, 1501-2). He began his analysis by determining the ZIP codes from which UAH and UGH drew their patients prior to the acquisition.

49. Dr. Melnick's Elzinga-Hogarty analysis of patient discharges by various ZIP code groupings (CX-86) for several markets including those proposed by him (Tr. 714-15) and by complaint counsel (Ukiah-Willits and Ukiah-Willits-Lakeport) produced the following LOFI and LIFO results (from CX-87):

CALCULATION OF LOFI AND LIFO MEASURES FOR ALTERNATIVE MARKETS

Geographic Area	LOFI	LIFO	Average
Ukiah	71%	82%	76%
Ukiah + Willits	85%	81%	83%
Ukiah + Willits + Lakeport	91%	75%	83%
All Mendocino Co. + all Lake Co. + Santa Rosa	83%	78%	81%
All Mendocino Co. + all Lake Co. + Santa Rosa + Healdsburg + Sebastopol + St. Helena	89%	83%	86%

50. The Ukiah-Willits area consists of 15 ZIP codes surrounding Ukiah and Willits in southeastern Mendocino County; the Ukiah-Willits-Lakeport area includes these ZIP codes plus an additional seven ZIP codes in western Lake County (CX-86; CX-18-C).

51. The area that includes all of Mendocino and Lake Counties plus Santa Rosa, Healdsburg, Sebastopol and St. Helena corresponds to respondents' proposed alternative geographic market, which includes all of Mendocino, Lake, Sonoma and Napa Counties, but omits Queen of the Valley Hospital in Napa, Sonoma Valley Hospital in Sonoma and Petaluma Valley Hospital in Petaluma (Tr. 1496, 1614, 1619; RX-387). Dr. Melnick rejected this market, which has the highest LIFO-LOFI average, because there were other smaller markets with similar statistics (Tr. 746-47).

52. The Ukiah-Willits area is the smallest market that meets the Elzinga-Hogarty standard; with a LOFI of 85 and a LIFO of 81, it falls between its weak and strong thresholds (CX-87). The Ukiah-Willits-Lakeport market, with a LOFI of 91 and a LIFO of 75, is the smallest geographic market that satisfies the strong standard for one prong of the Elzinga-Hogarty test and satisfies the weak standard for the other prong (CX-87). Neither of the markets proposed by Dr. Melnick satisfy the Elzinga-Hogarty 90/90 strong market test (Tr. 825), a standard which Elzinga and Hogarty in later articles expressed a preference for (Tr. 742-43, 824-25). While either one is a relevant market, if forced to choose, Dr. Melnick would pick Ukiah-Willits-Lakeport as the "most defensible" (Tr. 742).

53. The data compiled by Dr. Melnick reveals that many patients from the Ukiah-Willits-Lakeport area needing inpatient hospital services seek it elsewhere (2,711 in 1987 (CX-88)). The question is whether they do so because Ukiah hospitals do not provide the services needed by them, or whether they leave the Ukiah area even though hospitals in that area provide the services they need. If the former is the case, these patients could not be harmed by the acquisition and their number is irrelevant in analyzing the appropriate geographic market. If the latter is true, the proposed market does not accurately describe the competitive interactions of hospitals in the area.

54. Dr. Melnick tried to answer this question by adjusting the LIFO figure for the Ukiah-Willits-Lakeport proposed market to account for those patients who left that area for services that were

not available there (Tr. 755-56). Dr. Melnick's adjustment used "Diagnosis Related Groups" or "DRG" data to calculate this number.

55. California regulations require hospitals to file DRG reports with OSHPD that classify each patient according to cause of hospitalization (Tr. 730-32). Each DRG is assigned a weight that indicates the relative resource requirements for treating the typical patient with that particular DRG and Dr. Melnick testified that a higher DRG-weight implies a more complex case (Tr. 731).

56. By Dr. Melnick's calculation, the residents of the Ukiah-Willits-Lakeport area who were hospitalized outside that area in 1987 were classified in DRGs that have a 38 percent greater severity weight than those residents seeking hospital services at facilities within the geographic market, and this suggested to him that patients leaving the area are different from those staying in the area since the intensity of services delivered to them by hospitals outside the area is much higher (Tr. 747-48, 841).

57. The reports that hospitals file with OSHPD also list procedure and diagnosis codes for each patient which identify the medical problems for which each patient was treated and the medical procedures and techniques employed to address the patient's diagnosis (Tr. 749-50).

58. Of the 2711 patients who left the Ukiah-Willits-Lakeport area for inpatient care in 1987, 1045 (or 39 percent) had a specific diagnosis or received a specific procedure that complaint counsel allege was not delivered at any hospital in the area (CX-88). Dr. Melnick conceded that some of these 1045 patients could have been treated at hospitals in the area (Tr. 851); however, some procedures such as neurosurgery, cardiac surgery and organ transplants are not available in the area and would have to be provided by tertiary care hospitals (Tr. 332, 916-17, 988-89, 1029, 1688-89).

59. Dr. Melnick calculated an adjusted LIFO for the Ukiah-Willits-Lakeport area by omitting all patients with unique diagnosis or procedure codes. The adjusted LIFO for this area was approximately 84 percent and the adjusted LOFI-LIFO average was approximately 88 percent (Tr. 756-57; CX-89).

60. Adjusting market data by omitting patients with unique needs not provided by hospitals in the market is theoretically sound, as UAH recognized in its 1989 strategic plan:

> Outmigration . . . demands . . . further detailed analysis. This analysis needs to identify specific Specialty Line outmigration, and may need to get as specific as looking at DRG's and principal procedures for outmigrating patients.

(RX-5-Z-129; *see also* CX-17-F-G). However, Dr. Melnick's analysis is flawed and one cannot, therefore, rely on his estimate as to how many of the 2711 outmigrating patients sought tertiary care.

5. Criticism of Dr. Melnick's Analysis

61. Dr. Lynk rejected Dr. Melnick's attempt to refine his LIFO calculations to determine how much of the outmigration of patients from the Ukiah-Willits-Lakeport area was competitively insignificant in 1987.

62. Dr. Lynk criticized Dr. Melnick's unique diagnosis and DRG weight analyses for patients seeking treatment inside and outside his proposed relevant geographic market, arguing that Dr. Melnick's claim that average DRG weight differed between the two groups of patients ignored the significant DRG overlap between groups (Tr. 1504-10).

63. Dr. Lynk examined all DRGs for patients treated at UAH and UGH from 1984 through 1987, and then determined the extent to which those DRGs also appeared for patients treated in hospitals outside the service area. He concluded that when patients sought treatment at SRMH, four out of five times it was for a DRG that was also performed in Ukiah. As to SRCH, patients there were treated 97 percent of the time for a DRG which had also been performed in Ukiah hospitals (Tr. 1526-27; RX-160; RX-162). He concluded, contrary to Dr. Melnick, that of the 25 percent of patients seeking treatment outside of the hospital area, a majority sought treatment available within the service area (Tr. 1528).

64. Dr. Lynk also concluded that Dr. Melnick's analysis of unique diagnoses and procedures was not a valid measure of

treatment procedures inside and outside his proposed market (Tr. 1521-22) because classifications at this level did not necessarily reflect distinct medical procedures.

65. As an example, Dr. Lynk referred to diagnosis 140.0 in ICD-9-CM (the International Classification of Disease coding manual) which is malignant neoplasm of the upper left vermillion border and to diagnosis 140.1 -- malignant neoplasm of the lower left vermillion border (Tr. 1513).

66. The flaw in Dr. Melnick's diagnosis and procedure analysis is that:

> if a patient left the area, went down to Santa Rosa for treatment of a malignant neoplasm in his upper left, and his next-door neighbor stayed put and was treated for a malignant neoplasm of the lower left at Ukiah Valley, the Melnick Uniqueness Analysis would say there's no competitive overlap here . . . .

(Tr. 1513-14).

67. Thus, the failure to find that a Ukiah hospital performed a certain procedure in a given period of time while a Santa Rosa hospital did does not prove that the procedure could only be performed in Santa Rosa (Tr. 1515).

68. Dr. Lynk's criticism of Dr. Melnick's DRG weight and "unique diagnosis and procedure" analyses is convincing, and I conclude that they do not accurately measure the competitively insignificant outmigration from the Ukiah-Willits-Lakeport area. Complaint counsel conceded as much in oral argument:

> Q. What about quantitatively, though? How many -- of the 25 percent, do you know precisely how many went outside the area for tertiary care?
>
> A. No.
>
> Q. Does this record show that?
>
> A. No. The record simply shows that it is a substantial number, Your Honor.
>
> Q. Well, how substantial?
>
> A. Well, let me suggest that.
>
> Q. Okay.
>
> A. Thank you.

> Dr. Melnick suggested that one indicator of the extent to which patients were leaving the Ukiah area for care that was not available in Ukiah was to look at whether the outmigrating patients had left for procedures that are not available in Ukiah, or for treatment for diagnoses not normally treated in Ukiah. He found that, for 1987, 1,405 of the 2,700, or so, patients who left Ukiah had what he determined to be a unique diagnoses or procedure. Assuming that everyone of those people were not truly competitive, competitively significant, the LIFO for the proposed Ukiah-Willits-lakeport market rises to about 84.
>
> Now we know that's a soft number. We know it, Respondents know it, everybody knows it. And rather than apologize for the softness of the number, I want to suggest that it is soft in both directions, and that the analysis is clearly correct that there should be a substantial upward adjustment --

Dr. Lynk's DRG analysis (F 63) -- unchallenged by complaint counsel -- refutes their argument that a substantial upward adjustment is warranted.

69. In an attempt to determine how much of the 25 percent leakage from the Ukiah-Willits area was by inpatients seeking tertiary care, complaint counsel turn to documents authored by respondents' employees.

70. According to complaint counsel, the LIFO figure for the Ukiah-Willits area -- 81 percent -- actually overstates the competitively significant outmigration from that area by 13 percent -- that is, it is not 19 percent (100 percent minus 81 percent) but close to six percent of total admissions. This calculation is derived from a planning document which states that 44 percent of outmigration from respondents' core area was to hospitals in immediately adjacent counties while 56 percent was to hospitals in San Francisco and the Bay Area or to hospitals scattered around California (CX-17-H). Using this estimate, complaint counsel calculate that 10.6 percent of all admissions from the core area are unrecoverable (calculated by multiplying the 19 percent of Ukiah-Willits

patients who left this market for inpatient care by the 56 percent unrecoverable figure).

71. Complaint counsel also compute the percentage of admissions to Santa Rosa hospitals which is "competitively irrelevant" (CPF 61b) (*see* CX-18-R) (3%) and, adding this amount to the prior 10.6% calculation, estimate that 13 percent of the admissions from UAH's core area have no competitive significance (CPF 62).

72. Discounting the 6608 hospital admissions from Ukiah-Willits area in 1987 (CX-87) by 13 percent, complaint counsel calculate that there were 5800 remaining admissions from that area. Five thousand three hundred ninety five of these patients were hospitalized in Ukiah or Willits. Dividing this figure by 5800, complaint counsel calculate the adjusted LIFO for the Ukiah-Willits market as 93 percent.

73. Complaint counsel's adjusted figures for their proposed relevant geographic markets, using Dr. Melnick's adjustments for the Ukiah-Willits-Lakeport market and their adjustments for the Ukiah-Willits markets, are:

GEOGRAPHIC MARKET	LOFI	LIFO	Average
Ukiah + Willits	85%	81%	83%
Ukiah + Willits (excluding outmigration for services unavailable in the market)	85%	93%	89%
Ukiah + Willits + Lakeport	91%	75%	83%
Ukiah + Willits + Lakeport (excluding outmigration for services unavailable in the market)	91%	84% (approx.)	88% (approx.)

I reject complaint counsel's adjustment to the LIFO figure for the Ukiah-Willits area because it is based on planning documents whose accuracy is unverifiable and because it was not calculated

or referred to by Dr. Melnick in his testimony with respect to the geographic market and competitive injury. Since I have also rejected Dr. Melnick's adjustment to the Ukiah-Willits-Lakeport LIFO figure, I conclude that both Ukiah-Willits and Ukiah-Willits-Lakeport are such weak geographic markets that they do not describe the competitive interaction between hospitals in the Ukiah-Santa Rosa area.

74. The Elzinga-Hogarty test offers an easily-applied numerical standard for geographic market analysis, but its use in any particular case requires the exercise of judgment. Other evidence must, therefore, be considered to evaluate the soundness of any conclusion suggested by that test.

6. Other Evidence Relating To The Relevant Geographic Markets

75. In a 1986 analysis of the need to add a birthing center (RX-29), UAH posited a market that is almost identical to complaint counsel's proposed Ukiah-Willits-Lakeport market (*compare* CX-80 and RX-29-Z-2). UAH used the vital statistics for Lake and Mendocino Counties, not counting the areas served by Redbud Community Hospital in Clearlake and MCDH (RX-29-Z-2).

76. An analysis of the proposed acquisition of UGH performed for AHS/West by John Nuveen & Co., respondents' consulting firm, identified "Ukiah General Hospital's primary and secondary service areas" as "Ukiah and a twenty-mile radius surrounding the Hospital" (CX-14, at p. 25). This is a smaller area than the Ukiah-Willits proposed market (RX-392).

77. In May 1987, AHS/West's departments of strategic planning and budgeting described the geographic market within which the two Ukiah hospitals operate:

> Ukiah is a town of about 13,000 . . . . The service area around Ukiah accounts for about 40,000 people with an additional 10,000 situated around the town of Lakeport, about an hour from Ukiah, but served by another hospital. To complete the picture there is Howard Memorial Hospital in Willits, about 25 miles north. This 32-bed hospital is

> now managed by AHS/West and is an integral part of our strategy regarding Mendocino County.

(CX-16-B). This describes, almost exactly, complaint counsel's proposed Ukiah-Willits-Lakeport market (*cf.* CX-80).

78. Other hospitals in the area view their service areas as local in nature. For example, MCDH's 1989 market assessment described its service area as coastal Mendocino County, stated that inpatients from outside that area (Fort Bragg) were primarily tourists, and concluded that most patients from its service area who sought hospitalization elsewhere were seeking more specialized levels of care than MCDH provided (RX-112-B-C, G). This document also stated that MCDH physicians believe that patients have a "clear preference to remain in the service area when services are available because of the difficulty of traveling to other areas" (RX-112-G).

79. The authors of a UAH document discussing a new birthing center agreed with MCDH's assessment of its service area:

> [MCDH] serves the coastal area which is a distinctly separate market from the rest of Mendocino County and has very little impact on the obstetric market in the Ukiah area.

(RX-29-Z-7). The possibility that MCDH might reopen the birthing center which it had closed was of little concern; the "effect of this change will be negligible on the OB market in Ukiah" (RX-29-Z-10).

80. UGH's 1986 hospital management plan and budget noted the large number of specialty physicians represented on its medical staff and observed that "[p]atients previously leaving the area for care, are now staying due to the increase in specialties represented by the physician population" (RX-124-Z). The plan also states that "UAH continues to be a major competitor of UGH," but does not mention hospitals in Santa Rosa (RX-124-Z-6).

81. Jamie Hopping, the administrator of UGH from February 1988 until August 1988, testified that she viewed UGH's competition to be primarily UAH and, to a much lesser degree, MCH (Tr. 1202-03). Kelly Morgan, Ms. Hopping's predecessor, described UGH as a provider of "acute care or primary care"; patients needing complex or specialized care usually went to Santa Rosa

and San Francisco (RX-316-C-D, I). He stated that UGH competed with UAH and Mendocino Hospital in Ukiah, viewed Mendocino County as UGH's "priority service area" and therefore marketed UGH's services only in Mendocino and Lake Counties (RX-316-J-Z-2-3).

82. [

]

83. Nicki Poor, the associate administrator of SRCH, testified that most of its patients come from Sonoma County, with only about 1.5 percent coming from Mendocino County and about 2.5 percent from Lake County (Tr. 547-48, 556). Some patients from Mendocino and Lake Counties come to SRCH for services not available in those counties, such as neurosurgery (Tr. 553). She views SRMH and Kaiser Hospital in Santa Rosa as its competitors; SRCH does not compete with hospitals outside of Sonoma County (Tr. 549-50). Although SRCH advertises in the Santa Rosa *Press-Democrat* and on a Santa Rosa radio station which may reach into Mendocino County, SRCH is not attempting to reach patients residing there (Tr. 555, 565).

7. Medical Staff/Overlap And Patient Referrals

84. If physicians do not have privileges at a hospital, they are not permitted to admit patients (CX-33-I). Therefore, Ukiah area patients who regularly seek treatment at outlying hospitals and whose physicians do not have staff privileges at those hospitals would have to seek treatment from other physicians who do have privileges (Tr. 444-45; RX-318-Z-10-11).

85. The By-Laws of the Ukiah Valley's medical staff create four categories of staff membership: active, courtesy, consulting and provisional. Members of the active staff must have offices close enough to the hospital to provide appropriate continuity of quality care and they must regularly care for patients in the hospital. Their prerogatives include the right to admit patients and exercise clinical privileges and the right to participate in and vote

on medical staff matters and to serve as staff officers and on staff committees (CX-33-L-Q).

86. Members of the provisional staff also have the right to admit patients without restrictions. Their status is essentially probationary, and they are subject to being proctored by active staff members for a minimum of a year until a determination is made that they are qualified to be admitted to active status (CX-33-N-P).

87. Members of the consulting staff and of the courtesy staff do not have the unrestricted right to admit patients. Courtesy staff physicians are those physicians who do not regularly care for patients in the hospital, but who have admitting privileges at some other hospital. They may admit patients to the hospital, but only consistent with the requirement that they not admit regularly. They do not have the right to vote on staff decisions or to participate on medical staff committees (CX-33-M).

88. Members of the consulting staff are those physicians who have indicated that they are willing to be available for consultation, but they are not allowed to admit patients to the hospital (CX-33-N). Frequently, members of the consulting staff at Ukiah Valley are physicians from Santa Rosa or San Francisco who can be called upon to consult with local physicians in difficult cases (CX-46-E-F).

89. Other hospitals have similar privilege categories (CX-47-A-F; CX-48-A-E; CX-49-A-D; CX-50-A-C; CX-52-A-F; CX-53-A-G; CX-56-A-Z-9; CX-57-A-Z-11; CX-59-A-O; CX-60-B-Z-4; CX-61-G-K).

90. The 1991 medical staff rosters of Ukiah Valley and surrounding hospitals show the following overlaps of physicians with active or provisional privileges or their equivalent:

a. Of the 88 physicians with active or provisional privileges at Ukiah Valley in 1991, seven had comparable privileges at Lakeside (*compare* CX-46-E-F and CX-50-A-C).

b. Of the 88 physicians with active or provisional privileges at Ukiah Valley in 1991, one had comparable privileges at MCDH (*compare* CX-46-E-F and CX-53-A-G).

c. Of the 88 physicians with active or provisional privileges at Ukiah Valley in 1991, one had comparable privileges at SRCH (*compare* CX-46-E-F and CX-57-A-Z-11). That physician, Dr. Charles Evans, is a specialist in emergency room medicine (CX-46-E; CX-57-K) and, therefore, has no discretion about where to admit patients.

d. Of the 88 physicians with active or provisional privileges at Ukiah Valley in 1991, none had comparable privileges at SRMH (*compare* CX-46-E-F and CX-59-A-O).

91. Physicians can serve patients from a greater distance on an outpatient basis than an inpatient basis (Tr. 819). Consequently, it may be feasible for a Ukiah physician to treat outpatients in Santa Rosa, which is about an hour's drive (Tr. 99, 235-36, 1110, 1295-96), but it is generally impractical for a physician who practices in Ukiah to treat inpatients in Santa Rosa (Tr. 99-100, 173-74).

92. Some Ukiah physicians testified that they do not refer patients to Santa Rosa hospitals unless they need services that are not available in Ukiah (Tr. 477-80, 912-18, 919, 928-29, 944-45, 970-72, 1024-25, 1027-29, 1441). However, Dr. Valente testified that some patients are willing to travel to Santa Rosa for obstetrical procedures (Tr. 166; *see also* 858-59) while others have been referred by Ukiah physicians for treatment which is available in Ukiah:

> I have admitted patients to physicians in, say, Santa Rosa for laparoscopies, for pelvic tumors and so forth, pelvic surgeries, hysterectomies for persistent dysfunctional bleeding. These are not rare conditions. The services, frankly, are available in Ukiah.

(Tr. 291).

93. Dr. Pena testified that patients are able to go to Santa Rosa for hospital services if they want to (Tr. 281-82), and he has referred patients to Santa Rosa hospitals for procedures that were available in Ukiah (Tr. 289-92).

94. Although they were disgruntled, Dr. Falk treated several patients from Lake and Mendocino Counties at the Kaiser facility in Santa Rosa who were required by Kaiser to be treated there (Tr. 928-29), and Dr. Gester is aware of Ukiah area residents who go to Santa Rosa for primary or secondary care (Tr. 1710), as is Dr. Jepson (Tr. 1439-40). Once, Dr. Valente used the threat of sending patients to a Santa Rosa surgery center to pressure UAH into buying a laparoscope (Tr. 110-113).

95. Mr. King, the executive director of Travelers Insurance Company, testified that his insured, the employees of Mendocino County:

> do use Santa Rosa Memorial Hospital to a considerable extent. Not to as great an extent as they use the hospital in Ukiah. But I do know that there is, for example, not a majority of the hospital expense dollars in the customers' claims experience going to Ukiah hospitals. They are distributed around quite a wide array. So there seems to be some basis for the members selecting hospitals outside of Ukiah, voluntarily at the present time; and I'm not sure why this is. Whether it's because of the geography or preference for their services, or just what.

(Tr. 1242).

Mr. Harold Strunk of Blue Shield of California testified:

> Q. If hypothetically the Ukiah Valley Medical Center opposed rates that Blue Shield deemed were unreasonable, would it be feasible for Blue Shield to insure people who lived in Ukiah and direct them to a Preferred hospital in Santa Rosa, or would that harm your ability to market the Blue Shield Preferred product in Ukiah?
>
> [objection to the form of the question omitted]
>
> A. I would think that people would gravitate toward Santa Rosa, a bigger center, than they would to go anywhere else that would be even more rural. It's not that far away. It's, what, a half hour, 45 minutes perhaps at most, depending on how you drive.

96. Dr. Stein of the Kaiser hospital in Santa Rosa testified that Kaiser expects its patients to use its facilities (RX-372-T), and that quite a number of patients from Mendocino and Lake Counties do so for primary, secondary and tertiary care (RX-372-T-Y-Z-Z-1). Under Medi-Cal guidelines, Ukiah patients could be required to use Santa Rosa hospitals (Tr. 582, 1109).

97. The evidence cited above indicates that while some of the outmigration from the Ukiah area is for services not available in the proposed market, Santa Rosa hospitals are used regularly by a considerable number of Ukiah area residents for routine medical care. This suggests that more patients, either by choice or by force of circumstances, could do so.

98. Taking into consideration Dr. Melnick's Elzinga-Hogarty analysis and other record evidence relating to patient outmigration, *e.g.* (F 63), I conclude that the relevant geographic market is Ukiah-Willits-Lakeport-Santa Rosa.

8. Respondents' Proposed
Relevant Geographic Market

99. Dr. Lynk calculated the relevant geographical market by determining where 90 percent of the consumers who live in the service area go for hospital care (Tr. 1478), or, to put it another way, what hospitals accounted for 90 percent of hospital admissions of the service area residents (Tr. 1485).

100. Based on this analysis, Dr. Lynk concluded that the geographic market must include an area that accounts for the following hospitals located in southern Mendocino County, parts of Lake County and Napa County and probably all of Sonoma County (Tr. 1487): UGH, UAH, Mendocino Coast, Howard Memorial, Mendocino Community (all in Mendocino County), Lakeside Community, Redbud Community (both in Lake County), Santa Rosa Memorial, Santa Rosa Community, Warrack Medical Center, Healdsburg General, Palm Drive, Petaluma Valley, Sonoma Valley (all in Sonoma) and St. Helena and Queen of the Valley (in Napa) (RX-257; RX-258; Tr. 1503).

101. I reject Dr. Lynk's proposed market because his methodology incorporates some hospitals which are located so far from Ukiah that it is inconceivable that they would impose any competitive constraint on the activities of Ukiah Valley. This is not a conclusion without a foundation for respondents suggest an alternative market definition which "would exclude Sonoma Valley, Petaluma Valley and Queen of the Valley in light of their greater distance from Ukiah" (RPF 241). I do, however, conclude that the extensive admission by Santa Rosa hospitals of Ukiah area residents for routine inpatient care (F 63) indicates that they should be included in the relevant geographic market.

F. The Competitive Effects Of The Acquisition

1. Concentration

102. The HHIs for acute care inpatient hospital services in the Ukiah-Willits area are:

Measure	Pre-Merger HHI	Post-Merger HHI	Increase
Patient Discharges	4402	8757	4355
Inpatient Days	4646	8892	4246

(Cx-83). The market shares of the competitors in the Ukiah-Willits area before and after the UGH purchase are:

Competitor	Patient Discharges Pre-purchase	Patient Discharges Post-purchase	Inpatient Days Pre-purchase	Inpatient Days Post-purchase
UAH and Howard Hospital	46%	93%	57%	94%
UGH	47%	–	37%	–
MCH*	7%	7%	6%	6%

(CX-83). (*Mendocino Hospital).

103. The HHIs for acute care inpatient hospital services in the Ukiah-Willits-Lakeport area are:

Measure	Pre-Merger HHI	Post-Merger HHI	Increase
Patient Discharges	3196	5933	2737
Inpatient Days	3346	6009	2663

(CX-83). The market shares of the competitors in the Ukiah-Willits-Lakeport area before and after the UGH purchase are:

Competitor	Patient Discharges Pre-purchase	Patient Discharges Post-purchase	Inpatient Days Pre-purchase	Inpatient Days Post-purchase
UAH and Howard Hospital	36%	74%	45%	75%
UGH	38%	--	30%	--
MCH	5%	5%	5%	5%
Lakeside	21%	21%	21%	21%

CX-83).

104. Prior to the acquisition, there were three competitors in the Ukiah-Willits area and four in the Ukiah-Willits-Lakeport area. Immediately after the acquisition, there were two competitors in the Ukiah-Willits are and three in the Ukiah-Willits-Lakeport area. At the present time, there is one competitor -- respondents -- in the Ukiah-Willits area, and there are two competitors in the Ukiah-Willits-Lakeport area.

105. The post-acquisition HHIs understate the concentration of the market, because they include the market shares of Mendocino Hospital, which left the market.

106. In either of these areas, the post acquisition HHI is above 1800 and the areas are highly concentrated (Tr. 765).

2. Market Power

107. After reviewing the post-acquisition HHIs, Dr. Melnick concluded that the acquisition confers market power on respondents, and that there is a "great possibility" that residents in the Ukiah-Willits-Lakeport area, and insurance companies serving those residents, would, because of the increased likelihood of successful collusion, have to pay higher prices (Tr. 766). He also expressed concern that Ukiah Valley would be able to set prices above marginal cost because of its dominant firm position (Tr. 767-68).

108. Dr. Melnick did not believe that hospitals outside this market, like those in Santa Rosa, provided a sufficient check on the exercise of market power because they were more than 60 miles from Ukiah and were not, therefore, a viable alternative for an HMO or PPO seeking to build a provider network.

109. His conclusion regarding market power was based, in part, on an analysis of the proposed acquisition by Nuveen & Co. (CX-14) which stated:

> The acquisition is sound because it increases AHS/W's market presence, and, consequently, its third-party contracting power in the Ukiah area . . . .
>
> By acquiring [UGH], the link between the AHS/W's Willits and St. Helena facilities will be fortified, and the Adventist System will be vying for a dominant position on the Route 101 corridor between Eureka and Santa Rosa.

(CX-14-F). A second Nuveen study analyzing the benefits of the UGH purchase concluded:

> The potential economies of scale and large marginal revenue increases are not as readily available in the Ukiah market as in Lawrenceburg, because two facilities would continue to be operated . . . . The real benefit to consolidation in this market is the sole provider status. A sole community provider should entail reduced competition for medical staff members and nursing personnel . . . .

(CX-15-G).

110. Dr. Melnick also referred to an AHS/West analysis, dated May 1987, listing as arguments in favor of acquiring UGH (1) the "opportunity . . . for AHS/West to dominate the 101 corridor, from Santa Rosa north to Eureka"; and (2) that "whoever dominates Ukiah will, inevitably, dominate Mendocino and northern Lake County" (CX-16-H).

111. Respondents insist that these statements are not as damning as Dr. Melnick claims, but they do suggest that the proposed acquisition was favored because it would eliminate a competitor and enhance AHS/West's "presence" in the Ukiah area.

112. However, AHS/West's "presence" in Ukiah is significant only if it can exercise market power, a conclusion which I cannot accept because the relevant markets proposed by complaint counsel are "weak" according to Elzinga-Hogarty standards and inpatient outmigration from these alleged markets for routine medical care to Santa Rosa hospitals would be a likely response to the attempted exercise of such power. This would seem to be the reason why third-party payors expressed no concern that the acquisition would leave the Ukiah area with only one hospital (RX-371-I-4; RX-373-N). Significantly, Dr. Melnick's analysis of probable competitive injury did not include any consideration of the effect of adding the Santa Rosa area as part of the relevant geographic market (Tr. 880).

3. Entry Conditions

113. Andrew Door, an architect employed as project director for the San Francisco architectural firm of Anshen & Allen Architects, has direct experience in the construction of California hospitals (Tr. 597-99). He testified that it requires approximately six to eight months for the architectural firm and medical planners to define the size of a proposed hospital and the budget parameters, and to select a suitable site (Tr. 599). It takes an additional fifteen to eighteen months for the architectural team to produce a set of production documents for approval by OSHPD (Tr. 600-02) which takes from eight to twelve months to review them (Tr. 600-02). After OSHPD approval is obtained, it takes from twenty to twenty-

four months to construct the hospital (Tr. 602). After construction is completed, the hospital must then be approved by OSHPD to ensure that it meets safety codes, and earthquake and other regulatory standards (Tr. 602). Once approved, the hospital must be licensed and supplied for occupancy (Tr. 602-03). The entire process typically takes four to five years (Tr. 601).

114. Melvin N. Hardman is principal architect for OSHPD and is intimately familiar with the process for constructing hospital facilities in California (Tr. 480-81, 490). OSHPD must review and approve hospital plans before construction of a hospital facility can begin (Tr. 482-87).

115. The process of constructing a hospital begins with the owner developing feasibility studies to determine the size and nature of the hospital (Tr. 481). The owner must then secure property that is geologically and seismically suitable and obtain the necessary permits (Tr. 481-82). This preplanning stage takes from one to two years (Tr. 482). Once permits are obtained, the owner will normally hire an architect and/or engineer to begin preparing production documents which are then presented to OSHPD for initial review which can take from six to eight months (Tr. 482-85). It takes an additional one to two months to obtain OSHPD approval of the production documents and to obtain a building permit (Tr. 486). Actual construction takes about one and one-half years (Tr. 487). After construction is completed, the hospital must be inspected by OSHPD, licensed by the California Department of Health Services, and outfitted before occupancy. After construction is completed, OSHPD conducts the final inspection of the project (Tr. 487-89). Mr. Hardman estimated that it takes from three to five years to construct a fifty-bed hospital in California (Tr. 489).

116. Respondents argue that a potential competitor could enter the Ukiah market by purchasing and reopening the former Mendocino Hospital facility which was closed in 1990 (RPF 506-15). I disagree, for at the time it was closed, it was in poor condition: the roof needed repair; the hospital's equipment was antiquated; and the emergency room had been closed down (Tr. 202). Mendocino Hospital had only one surgical suite, so only

limited surgery could be performed (Tr. 181). Moreover, the structure needed major seismic work (Tr. 181-82, 208). Ms. Mahoney, its former administrator, estimated that it would cost from $4 to $8 million to renovate Mendocino Hospital to make it an acute care facility and that the cost of the necessary seismic work alone would be from $400,000 to $550,000 (Tr. 206-08). It would take at least two years to complete this work (Tr. 209). In any event, the facility is probably unavailable because Mendocino County has recently announced plans to convert it into a county administrative and health services office complex (Tr. 204-06).

4. Hospital Competition

117. Dr. Melnick testified that hospitals compete on price and service, and that this competition benefits consumers (Tr. 704-06). For example, a study of his shows that in hospital markets where there is competition, charges to third-party payors rise more slowly than in one hospital markets (Tr. 699-70; CX-90-C).

118. A 1988 paper written by Dr. Melnick and Jack Zwanziger stated that: "Previous studies of hospital competition have found that greater competition leads to higher costs." This paper concluded that programs in California intended to contain the rate of increase in hospital costs seemed to have worked (RX-365-A); however, it cautioned that: "It will be important to examine in future research whether these cost-reducing effects will persist in the long run . . . ." (RX-365-Q).

119. Furthermore, respondents' counsel reminded him that:

> Q. And your own research shows that one-hospital markets have lower costs than two-hospital markets. So the expectation in Ukiah would actually be that the Ukiah Valley Medical Center would be a lower cost hospital.
>
> A. If the world stopped today and we left it like that, that would be the case. That's called the static.
>
> Q. All right.
>
> A. What we are looking at is a dynamic market, and by virtue of the use of competition and competitive pressure, we saw that costs started to decline. The gap between these

> are narrowing. And if we can keep that competitive pressure in markets in California, and in other places, we hope to see these lines cross.

(Tr. 871).

120. Hospitals compete for managed care contracts with third-party payors on the basis of both price and service. Representatives of Blue Shield of California and Blue Cross of California, the major third-party payors in Mendocino County, agreed that managed care contracts are sold on the basis of price and that hospital competition placed these third-party payors in a better negotiating position (RX-318-T); RX-371-Q; RX-373-Y-Z).

121. Third-party payors are price-sensitive when contracting for hospital services. Harold K. Strunk, Blue Shield's regional manager for hospital relations, stated:

> If there are . . . hospitals near or around your service area that meet your criteria for contracting, quality, and can work with you on price, then you can keep your rates down. [W]e're always aware of other hospitals, and we're always cognizant of ways that might reduce what our costs will be.

(RX-371-Q).

122. UAH and UGH competed for managed care contracts on both price and service. UAH's strategic plan for 1989 noted that "Ukiah General Hospital seems to have been very aggressive in landing such [commercial insurance] contracts, whether or not they were always advantageous" (CX-17-N; *see also* RX-316-Z-4-5).

123. Prior to the acquisition, Blue Shield of California had a managed care contract with UGH because it was a full-service hospital, *i.e.*, it had an obstetrical unit, whereas UAH did not (Tr. 360-61; RX-25-A; RX-371-Q). In August 1986, UAH applied to OSHPD for a permit to construct a birthing center so that it could better compete with UGH for managed care contracts (Tr. 360-61; RX-29-G). The proposed UAH facility would have been a 5,500 square foot "Birthing Center," which would have included four labor/delivery/recovery/postpartum ("LDRP") rooms and would have essentially duplicated UGH's obstetrical unit (RX-29-Z-41; RX-30-Z-7; Tr. 360-62; *see also* RX-29). UAH's explicit goals in building the birthing center were to become a full service

hospital in order to attract a higher percentage of female patients of child-bearing age and thus be able to compete for managed care contracts (Tr. 360-61; RX-29-D, G-H). As of 1986, UGH had the only obstetric facility in Ukiah (Tr. 360; RX-29-D; RX-30-Z-7). Its facility was described as overcrowded and unresponsive (Tr. 102; RX-29-Z-7). Prior to the acquisition, UGH had approximately 93 percent of the Ukiah obstetrical market (CX-15-Z-14).

124. UGH responded to UAH's proposed birthing center by expanding and improving its birthing center. A 1987 UGH planning document discussed the need to expand its birthing center to meet the challenge posed by UAH's proposed birthing center:

> [UAH] has signified its intent to enter the obstetric market with the construction of a 4-bed birthing unit. With the addition at the Ukiah General Hospital, we will maintain our strong competitive position for OB services and possibly deter the competing facility from proceeding with their plan.

(RX-125-A; Tr. 1204-05). The expanded UGH birthing center included eight LDRP rooms and a Level II neonatal nursery, which was described as being on the cutting edge of technology (CX-66-C; Tr. 106-07). The Level II nursery permitted UGH to treat newborns who would otherwise have been transferred to hospitals in Santa Rosa or San Francisco (Tr. 105-06). In addition, the presence of the Level II nursery permitted women with high-risk pregnancies to give birth at UGH, rather than at hospitals in Santa Rosa or San Francisco (Tr. 105-06).

125. The expanded UGH birthing center and Level II neonatal nursery was an improvement in the quality of care for Ukiah-area patients (Tr. 103-07).

126. Hospitals also compete for physicians, because physicians usually make the decision where to hospitalize patients. In its 10-K Annual Report (CX-64), HealthTrust described the role of physicians as the gatekeepers for hospital admissions:

> Since physicians control the majority of hospital admissions, a significant factor in a hospital's competitive position is the number and quality of physicians on its medical staff. A physician may at any time terminate his or her affiliation with a Company owned hospital. Accordingly, the Compa-

> ny seeks to retain physicians of varied specialties on its hospital staffs and to attract other qualified physicians by maintaining high quality facilities and equipment, dedicated employees and comprehensive support services for physicians and their patients, as well as high ethical and professional standards. The Company believes that physicians refer patients to a hospital primarily on the basis of the quality of services it renders to physicians and patients, the qualify [sic] of other physicians on the medical staff, the location of the hospital and the quality of its facilities, equipment and employees.

(CX-64-F).

127. UGH and UAH competed to influence physicians' decisions about where to admit patients by improving services and adding and updating equipment (Tr. 102-03, 109-10, 163-64, 630, 632-34, 899-900, 962). Ms. Mahoney testified that the loss of UGH and Mendocino Hospital as competitors resulted in loss of physician leverage and that when there were two or three hospitals in Ukiah, hospital administrations were more responsive to physicians' quality assurance concerns and equipment needs (Tr. 187-89, 199-201).

128. Despite the fact that hospitals do compete in terms of price, that competition is limited to only a portion of their patient census.

129. Approximately 45 percent of Ukiah Valley's patients are Medicare patients (Tr. 400-01, 1058). Medicare is a federally-funded program under which health care provides are reimbursed a set amount for a particular DRG (Tr. 399-401, 1058, 1214). Medicare dictates how much Ukiah Valley is reimbursed for treating Medicare patients (Tr. 399, 561). Usually, Medicare reimbursements are less than Ukiah Valley's cost of treatment (Tr. 1361-62).

130. Approximately 20 percent of Ukiah Valley's patients are Medi-Cal patients (California's Medicaid Plan) (Tr. 1062). Medi-Cal reimburses a health care provider based upon its definition of the cost of providing certain services. Its reimbursement, which is usually lower than Medicare's, is expected to

decrease even further in the future (Tr. 401, 576, 588-89, 1062-63, 1366).

131. Medi-Cal reimburses Ukiah Valley under a non-negotiated cost-basis scheme (Tr. 577). Medi-Cal's reimbursement for patient treatment, which it dictates, is lower than Ukiah Valley's actual treatment cost (Tr. 561, 1361-62).

132. Seven to eight percent of Ukiah Valley's patients are no-pay patients (Tr. 1063); thus, about 75 percent of Ukiah Valley's customers (Medicare, Medi-Cal and no-pay) dictate how much it will be reimbursed for patient treatment (Tr. 1064). Dr. Melnick's analysis of competitive effects ignored payor mix (Tr. 797-98).

133. Mr. Harold Strunk, regional manager for hospital relations for Blue Shield of California, testified that if Ukiah Valley did not offer a reasonable rate, its subscribers probably would have to go to SRMH (RX-371-Z-3-4) and Mr. Devitt, Ukiah Valley's administrator, claimed that it could not dictate prices to third-party payors because they could send their subscribers to hospitals in Santa Rosa (Tr. 1066).

G. Post-Acquisition Conduct

134. Dr. Melnick ignored any-post acquisition effects in this case because an acquiring firm is aware of the possibility of an investigation and litigation and may be tempted to forego the exercise of any market power it possesses (Tr. 814).

135. Complaint counsel suggest, however, that an analysis of post-acquisition conduct reveals adverse effects on the price and quality of the hospital services offered by Ukiah Valley.

136. Prior to the acquisition, UAH and UGH offered complete on-site laboratory services (Tr. 115, 974); afterwards, laboratory services were consolidated at the UAH site at Hospital Drive, more than one mile from UGH's Dora Street facility (Tr. 116), and physicians with patients at the latter facility must now send specimens by courier to the Hospital Drive site for processing and evaluation (Tr. 620-21).

137. Some Ukiah physicians testifying at the hearing charged that they have experienced significant delays in obtaining laboratory results at the Dora Street site -- delays which might place a patient at risk if prompt test results were essential (Tr. 114-18, 620-22, 924-25, 974-76).

138. In its 1989 strategic plan, UAH acknowledged "ongoing consolidation problems, *i.e.*, clinical lab, as a result of partly developed and implemented consolidation plans" (RX-5-Z-130).

139. Some Ukiah physicians also complained that the closing of the Dora Street emergency room adversely affected the quality of services provided at that site (Tr. 202, 261-64, 274-75, 622-24, 900-07, 926, 938; CX-43-B-C).

140. Prior to the acquisition, the emergency room was staffed by a physician 24 hours a day, seven days a week, and emergency room physicians acted as backup for UGH's intensive care and neonatal intensive care units (Tr. 922-23, 1235, 1682). The committee coordinating the UAH/UGH consolidation expressed their concern, in memoranda dated August 31, and September 8, 1988, about problems which could be caused by closure of the UGH emergency room (RX-39-F-G, K-L).

141. Dr. Valente testified that hospital charges for a laparascopic tubal ligation were about $1,500 in 1988 and are now more than $3,000 (Tr. 124); that charges for a tubal reanastomosis were $3,500 in 1988 and are now between $8,000 and $9,000; and that charges for a hysterectomy were about $3,500 before the acquisition and are now close to $6,000 or more (Tr. 124-25). Dr. Baltins testified that charges for a simple arthroscopy of the knee were between $1,400 and $1,500 before the acquisition; they are now about $4,700 (Tr. 1036-38).

142. Complaint counsel also claim that Ukiah Valley's charges for certain surgical procedures are substantially greater than at Santa Rosa hospitals (CPF 133).

143. Dr. Valente's and complaint counsel's claims are anecdotal and do not constitute reliable evidence that, because of the acquisition, Ukiah Valley has been able to charge more for comparable procedures than other hospitals.

144. A much more extensive pre- and post-acquisition analysis of prices charged by Ukiah Valley was conducted by Dr. Lynk. His study, using OSHPD data, compared Ukiah Valley's gross average charges for the top 20 DRGs performed there (Tr. 1530-31; RX-169; RX-319) with prices charged for the same DRGs at other hospitals used by patients in the 45 ZIP codes that regularly send patients to Ukiah Valley (Tr. 1530-31; RX-169; RX-319).

145. Dr. Lynk concluded, from this analysis, that Ukiah Valley did not charge prices above competitive levels either before or after the acquisition; in fact, the gross charges at Ukiah Valley have been lower than the average of competing hospitals (Tr. 1532-34; RX-169).

146. Dr. Lynk reviewed prices charged by other hospitals affiliated with AHS/West and found that Ukiah Valley's pricing, relative to those hospitals, was neither inflated nor depressed (Tr. 1535-38; RX-319).

147. Dr. Lynk testified that third-party payors seek as large a discount as possible off gross charges by a hospital and that a hospital exercising monopoly power would be expected to resist discounts from its gross charges (Tr. 1538, 1541-42). However, his analysis of Ukiah Valley's contractual reductions and adjustments to its charges indicate that from 1988 to 1991, it increased the percentage discounts off its charges for all inpatients -- from 30.3 percent to 45.9 percent for Medicare inpatients, from 20.1 percent to 35.6 percent for PPOs, from 23.3 percent to 33.8 percent for Medi-Cal inpatients, and from 27 percent to 31.8 percent to HMO inpatients (Tr. 1539-41; RX-196-201; RX-275).

148. Respondents also deny that the consolidation of the laboratory and the emergency room have created significant quality of care problems. They point out that Dr. Valente, a Ukiah physician who was concerned about the acquisition (Tr. 131), conceded that quality of care with respect to surgical results can be hard to measure and that he would not judge a physician on the basis of the complaints of a few patients (Tr. 129-30).

149. In fact, it is not unusual for physicians to be dissatisfied with hospital administrations (Tr. 667). Dr. Carter, a staff

emergency physician at Ukiah Valley, testified that "there is always an inherent distrust between medical staffs and administrator" (Tr. 1671).

150. While Ukiah physicians have complained about the post-acquisition consolidation of the UGH and UAH laboratories, there were complaints about the UGH laboratory prior to the acquisition (Tr. 1433, 1672) including the slow delivery of reports (Tr. 636-38).

151. Dr. Carter, a staff emergency room physician and chief of staff at Ukiah Valley (Tr. 1659-61), denied that consolidation of the emergency rooms at UGH and UAH reduced quality of care at Ukiah Valley; in fact, prior to the closing of the emergency room at UGH, he believed that the two emergency rooms should be consolidated because there were not enough patients to support them. In his opinion, a single emergency room would increase the quality of emergency care (Tr. 1677).

152. Prior to the acquisition, UGH had one full-time emergency room physician and two part-time practitioners, who were pediatricians. Only Dr. Carter was board certified in emergency medicine (Tr. 1660, 1664). Being board certified is a recognition by the medical profession that a physician is a specialist or is proficient in his or her particular field (Tr. 268, 1693).

153. Prior to the acquisition, there were four full-time and a number of part-time emergency room physicians at UAH. Two of the four full-time physicians were board certified. It was difficult to attract more board-certified physicians to UAH because of the low volume of patients (Tr. 1695-96).

154. Dr. Gester, head of the emergency room at UAH, Dr. Carter and Mr. Devitt testified that the consolidated emergency room at Ukiah Valley has attracted more qualified physicians and nurses (Tr. 1078-79, 1675-76, 1697-98): All of its emergency room physicians are board certified, and six of the eight are certified in emergency medicine (Tr. 1705). Dr. Gester and Mr. Devitt also believe that the acquisition was a factor in improving the quality of nurses, particularly in the emergency room (Tr. 1078, 1707).

155. Dr. Gester also believes that the acquisition was beneficial because prior to the acquisition, despite the low volume at UGH and UAH, a physician had to be at each facility (Tr. 1703). Now, with the consolidation, Ukiah Valley has double coverage during busy times and realizes greater economy during slower hours (Tr. 1703). In his opinion, if divestiture were ordered in this case and two emergency rooms were established, the quality of emergency room care would suffer (Tr. 1711).

H. Post-Acquisition Efficiencies

156. During his testimony, Dr. Lynk noted the "remarkably small size of both of these hospitals [UAH and UGH] prior to the consolidation" and referred to economic literature which recognizes that hospitals of this size are not large enough to compete effectively are much more likely to fail than larger hospitals (Tr. 1557-58, 1569-70).

157. After reviewing data concerning hospitals of various sizes compiled by the American Hospital Association, Dr. Lynk concluded that smaller community hospitals in California have a lower occupancy rate (Tr. 1558-60; RX-213). He also testified that smaller hospitals are less able to offer the services provided by large hospitals and are at a disadvantage in terms of labor cost (Tr. 1561-64; RX-214; RX-217; RX-216-A-O).

158. Dr. Lynk's opinion is confirmed in "Economic Analysis In Health Care Antitrust," an article written by FTC economists:

> A recent review of the literature on hospital cost function estimation fund that most analyses characterize production of hospital services as having constant returns to scale or constant unit cost with increasing output once a threshold of approximately 200 beds is reached. Thus, most of these studies indicate that hospitals below this size prior to the acquisition are not capable of producing hospital services with maximum efficiency. In particular, Grannemann found evidence of strong economies of scale in the production of emergency room services, and most studies which disaggregate hospital output find that average

costs decrease at least up to some point with increases in unit output and bed utilization. This would imply that a consolidation of the overlapping departments of the two hospitals might produce significant efficiencies due to the presence of scale economies in production.

159. Dr. Richard C. Stein, physician-in-charge at Kaiser Permanente Medical Group in Santa Rosa, testified that Kaiser would not build a hospital smaller than 100 beds (RX-372-G-H), and, while not necessarily agreeing with him, Dr. Melnick conceded that "most authors" find that cost per patient admission is minimized beginning at around 70 or 80 beds (Tr. 861).

160. Ukiah Valley's goal is to consolidate on one campus (Tr. 415, 429, 434, 1077-78, 1381-82, 1420; RX-4-C; RX-5-Z; RX-41-A-B) and Mr. Ammon, the executive vice-president of AHS/West, testified that it will cost between two and three million dollars to consolidate the facilities (Tr. 425).

161. However, Ernst & Whinney, which was hired by respondents to study the efficiencies of the combined operation, estimated that it would result in a one-time savings of $2.5 million -- mostly because UAH would not have to build its proposed birthing center (Tr. 384-86, 422).

162. Mr. Brett Spenst, Ukiah Valley's chief financial officer, estimated that between August 8, 1988 (the date of the acquisition) and December 31, 1991, Ukiah Valley has saved over $11,000,000 in operating costs as a result of the acquisition (Tr. 1381; CX-95-A-I). Some of the savings claimed by Mr. Spenst are:

> Elimination of a number of duplicative departments, resulting in reductions in full-time-equivalents ("FTEs") (Tr. 1371) in the accounting department (saving three FTEs) (Tr. 1371, 1393), medical records and transcription department (four FTEs) (Tr. 1372, 1393) food preparation department (two FTEs) (Tr. 1372), patient business offices (five FTEs) (Tr. 387, 1372), warehouse (one FTE) (Tr. 1373) computer services (one-half FTE) (Tr. 1373) and personnel (Tr. 1371).

163. According to Mr. Spenst, Ukiah Valley has also achieved efficiencies by reducing its length of stay by half a day through increased case management (Tr. 1372-73, 1393).

164. Other cost savings which Mr. Spenst claims are a result of the acquisition include:

Efficiencies achieved by consolidating the managements of the two separate hospitals (Tr. 387, 1070-71, 1098-99).

Realization of continuing ongoing annual savings by consolidating service departments (Tr. 387-88, 1072) including approximately $700,000 on emergency room fees by not having to staff two fully equipped emergency rooms (Tr. 623, 1376, 1402; RX-24; RX-48-A).

Savings of approximately $95,000 by having only one lab contract, rather than two separate contracts for pathology services (Tr. 1173-75, 1376). Supply expense, maintenance contract costs, and lease and rental costs have also been reduced significantly (Tr. 1376-77, 1411).

Increased experience rating at Ukiah Valley resulting in reduced malpractice insurance costs (Tr. 1378, 1399-1401).

Supplying its own blood needs has reduced costs in that area (Tr. 1378).

Foregoing the purchase of equipment which would duplicate UGH's equipment (Tr. 1099). This savings allegedly totals some $2.7 million (Tr. 1378-79, 1414-16). By avoiding duplicative Birthing Center equipment, Ukiah Valley supposedly saved approximately $500,000 (Tr. 389-90, 1103, 1167, 1380). Mr. Devitt also testified that Ukiah valley will also save money by selling existing duplicative equipment (Tr. 1170-71).

165. Complaint counsel challenge most of the claimed cost savings, arguing either that they are overstated or are offset by other costs, including the cost of consolidation.

166. The costs of full consolidation are not, as respondents argue, two to three million dollars. Acquisition costs alone were some $8 million (F 7) and respondents' proposed master plan for consolidation estimates that Phase I construction (OB/GYN Unit, pharmacy, conference rooms, ICU/CCU, "shelled space on two

upper floors" and central HVAC plant) would cost $8 million (RX-28-C, E-F).

167. The $16 million acquisition and renovation cost will be reduced when and if respondents sell the abandoned UGH facility but there is no reliable estimate of the profit, if any, which respondents would realize if it were sold.

168. Furthermore, the cost savings realized by not building a birthing center is merely a cost deferral, for if the facilities are consolidated, a new birthing center will have to be construed at the UAH site, probably at a cost of $4 million (RX-28-E).

169. Complaint counsel challenge respondents' estimate that they saved $1.89 million in salaries and benefits from August 1988 to December 1991 (CX-95-A), claiming that, when adjusted for inflation, respondents' salary and benefit costs per adjusted occupied bed are the same as the two hospitals' costs were before the acquisition (CPF 146-150).

170. Complaint counsel also argue that Mr. Spenst has overstated the savings realized from not operating a duplicate birthing center (CPF 153-54), property tax savings (CPF 152), savings from avoiding purchase of duplicate facilities (CPF 155) and staffing economies of scale (CPF 156).

171. Respondents' estimates of cost savings are not as precise as claimed, and they make some assumptions which may not be correct, but complaint counsel's criticisms do not take into account the effect of savings, no matter how modest at any particular moment, over a long period of time. For example, the construction of a new birthing center will be costly, but cost savings can probably defray the initial costs in three to five years. The benefits of the new center will be realized for many years to come (Tr. 389, 1194, 1380, 1420). As Mr. Devitt testified:

> Q. But those costs [of construction of the OB department] will have to be deducted from your savings. Isn't that fair to say that?
>
> A. On the one hand, I would say yes; but over the long-term operation, consolidation on the one campus will more than save the investment in the capital -- in the building. The building, as I said before, is a one-time

> capital expenditure. Once you have it built, you then gain the efficiencies of having everything on one campus. When we were going to have a $2 million investment in a second OB in town, it was going to be a $2 million investment and only, we hoped, half of the OB business in town, and splitting everything in that direction. We will have one facility and, with the efficiencies realized with one facility, we will realize a considerable savings in operations. It will pay for itself.

(Tr. 1168).

172. Thus, despite the uncertainties presented by respondents' estimates, I conclude that the full consolidation of UAH and UGH would result, over time, in significant cost savings as compared with the cost which would be incurred by UGH and UAH if they were to operate as separate facilities.

III. CONCLUSIONS OF LAW

A. Jurisdiction And Interstate Commerce

In its August 2, 1991, decision in this case, the Commission decided that Section 7 of the Clayton Act reaches asset acquisitions by not-for-profit entities; furthermore, the interstate commerce requirements of Section 7 of the Clayton Act have been met in this proceeding (SD ¶¶ 1-5).

B. The Relevant Product Market

Whether complaint counsel's proposed product market -- inpatient acute care hospital services -- is appropriate is determined by examining "the cross-elasticity of demand between the product itself and substitutes for it." *American Medical Int'l ("AMI")*, 104 F.T.C. 1, 191 (1984); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, 4 CCH Trade Reg. Rep. ¶ 13,104 at § 1.1 ("1992 Merger Guidelines").

The "cluster of products and services," *United States v. Philadelphia National Bank*, 374 U.S. 321, 356-57 (1963), offered by acute care hospitals to inpatients has been adjusted as the appropriate product market in several cases involving hospital mergers. *See FTC v . University Health Systems*, 938 F.2d 1206, 1210-11 (11th Cir. 1991); *Hospital Corp. of America ("HCA")*, 106 F.T.C. 361.

Respondents ask me to consider the size of UGH and UAH and their greater reliance than larger hospitals on outpatient business, a business which is facing increasing competition from surgicenters and other providers who are offering outpatient treatment for conditions which were formerly treated on an inpatient basis.

The record supports respondents' claim that outpatient providers are offering increased competition to hospitals' outpatient facilities (F 33), but this trend has no effect on inpatient care, for which there is no outpatient substitute. *United States v. Rockford Memorial Hospital Corp. ("Rockford")*, 898 F.2d 1278 (7th Cir. 1990):

> For many services provided by acute-care hospitals, there is no competition from other sorts of provider. If you need a kidney transplant, or a mastectomy, or if you have stroke or a heart attack or a gunshot wound, you will go (or be taken) to an acute-care hospital for inpatient treatment. The fact that for other services you have a choice between inpatient care at such a hospital and outpatient care elsewhere places no check on the prices of the services we have listed, for their prices are not linked to the prices of services that are not substitutes or complements. If you need your hip replaced, you can't decide to have chemotherapy instead because it's available on an outpatient basis at a lower price. Nor are the prices of hip replacements and chemotherapy linked.

The court recognized that a "growing number of services provided by acute care hospitals are also available from nonhospital providers," but noted that "for many services provided by acute-care hospitals, there is no competition from other sorts of providers." *Id.* at 1284. *See also HCA*, 106 F.T.C. at 464-66.

The evidence in this case justifies the same conclusion as in *Rockford, University Health* and *HCA*. UAH planning documents treat inpatient and outpatient care as separate businesses (F 32); physicians testified that the cluster of inpatient services offered by hospitals are not found at outpatient facilities (F 27); third-party payors will not pay for inpatient procedures if outpatient care would be adequate (F 31); and, most economists who study the hospital industry recognize that inpatient acute care hospital services are a relevant product market (F 29).

C. The Relevant Geographic Markets

A geographic market is the smallest area in which a hypothetical monopolist could impose a "small but significant and nontransitory" increase in price. 1992 Merger Guidelines § 1.21. *AMI*, 104 F.T.C. at 119. It is the area in which participants "effectively compete," and "to which the purchaser can practicably turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 332 (1961).

Past cases have viewed hospital markets as local in nature, *AMI* 104 F.T.C. at 197; *HCA*, 106 F.T.C. at 471-72) [sic]. In *Rockford*, the trial court stated: [P]hysicians and patient preferences for nearby hospitals in the main reason for keeping the geographic area relatively small," 717 F. Supp. at 1277.

Respondents do not deny that hospital markets are local in nature but they point to the Santa Rosa hospitals, located only 60 miles away, as reliable, "local" alternatives for inpatients who up to now have used hospitals in the Ukiah-Willits and Ukiah-Willits-Lakeport area.

The Ukiah-Willits and Ukiah-Willits-Lakeport markets are the smallest ones which satisfy the Elzinga-Hogarty test, but they are weak and Dr. Melnick's and complaint counsel's attempts to refine the LIFO figures for Ukiah-Willits and Ukiah-Willits-Lakeport are unconvincing (F 68-73).

The reason for their weakness is apparent: there is substantial outmigration from these areas for routine medical care, particularly to Santa Rosa, for Dr. Lynch's [sic] DRG analysis reveals that a

majority of the patients seeking care at Santa Rosa hospitals could have been treated at UAH and UGH (F 63), and some Ukiah physicians testified that Ukiah residents have sought medical care in Santa Rosa hospitals for conditions which would have been treated at Ukiah hospitals (F 92-93).

Health care providers also testified that their Ukiah subscribers do go or could go to Santa Rosa hospitals for routine medical care, and Medi-Cal guidelines suggest that requiring patients to do so would not be impractical (F 94-96).

Complaint counsel point to denials by other Ukiah physicians that they send their patients to Santa Rosa hospitals for routine care (F 92), to the lack of overlaps in the medical staff of Ukiah and Santa Rosa hospitals (F 90), to testimony by representatives of SRMH and SRCH (F 82-83), respondents' own analysis of UAH's and UGH's competitors (F 75-77, 79-81), and other hospitals' analyses of competition (F 78) as confirmation that the leakage from the Ukiah area to outside hospitals is competitively insignificant. All of these factors have been considered by the Commission and the courts in determining the boundaries of the relevant geographic market. *AMI*, 104 F.T.C. at 122, 123; *HCA*, 106 F.T.C. at 438; *Rockford*, 717 F. Supp. at 1277.

However, this evidence does not necessarily support complaint counsel's claim. Dr. Lynch's [sic] DRG analysis which shows significant outmigration for routine procedures suggests that Ukiah area patients are bypassing Ukiah physicians for physicians with hospital privileges in Santa Rosa -- and, in fact, [ ] of SRMH and SRCH's inpatients come from Mendocino and Lake counties. This is not an insignificant amount, since most of them receive routine medical care (F 63). *Compare Owens-Illinois, Inc.*, FTC Dkt. 9212 (Slip op. Feb. 26, 1992) in which the Commission found that the "presence of a substantial competitor . . . and a 4-5% market share [in metal cans] shows that metal cans compete with glass in this end-use segment." *Id.* at 16. Although this case involved product market definition, the same principle is applicable to the geographic market issues. Thus, the outmigration for routine care in this case is much more significant than in *AMI*, 104 F.T.C. at 122.

Also, references to "service areas" in documents cited by complaint counsel (F 76, 77) do not establish that they are relevant geographic markets, for that phase refers to the area from which hospitals draw their patients, not the area to which [sic] Santa Rosa. Finally, the fact that Santa Rosa hospitals did not view UGH and UAH as competitors does not mean that the larger hospitals do not attract Ukiah residents for routine care -- as they, in fact, do (F 63).

Since Ukiah residents can practicably turn to Santa Rosa hospitals for routine medical care if necessary, *Tampa Electric, supra*, and complaint counsel's proposed relevant geographic markets do not include those hospitals, I reject those markets.

D. Effects On Competition

Dr. Melnick's conclusion that the acquisition is anticompetitive is based on the very high HHI's in the Ukiah-Willits and Ukiah-Willits-Lakeport markets (F 102-06). He expressed no opinion with respect to the effects of the acquisition in a market which would include the Santa Rosa hospitals (F 112).

Since I have found that the relevant geographic market includes these hospitals, I reject Dr. Melnick's claim that the acquisition confers market power on Ukiah Valley. Other record evidence supports my conclusion.

No matter which market is chosen, the acquisition can have no effect with respect to Medicare, Medi-Cal and no-pay patients, for Ukiah Valley cannot charge prices which exceed the amounts allowed by Medicare and Medi-Cal and receives nothing from no-pay patients. Thus, Ukiah Valley can affect the prices charged to only 25% of its patients (F 128-32), and would face considerable opposition from third-party payors if it attempted to gouge their subscribers, including threats to use Santa Rosa hospitals (F 133). In fact, representatives of third-party payors expressed no concern about this acquisition (F 112). *See United States v. Archer-Daniels-Midland Co.*, 1991-2 CCH Trade Cas. ¶ 69,647 at 66,918, 66,922 (S.D. Iowa 1991).

E. Post-Acquisition Conduct

Some evidence regarding post-acquisition conduct may be considered when the potential impact of a challenged acquisition is assessed. *See United States v. General Dynamics Corp.*, 415 U.S. 486, 504-06 (1974); *United States v. Falstaff Brewing Co.*, 410 U.S. 526, 530 n. 11 (1973); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965).

However, since the possibility of post-acquisition price manipulation exists, I reject respondents' claim that Ukiah Valley has exercised pricing restraint (F 144-47). *See General Dynamics*, 415 U.S. at 504-05.

> If a demonstration that no anticompetitive effects had occurred at the time of trial or if judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.

On the other hand, proof that respondents have been able to raise post-acquisition prices is relevant; however, the evidence presented by complaint counsel is anecdotal and does not support their claim (F 141-43). *See Simeon Management Corp. v. F.T.C.*, 579 F.2d 1137, 1148 (9th Cir. 1978); *Wilk v. American Medical Ass'n.*, 1987-2 CCH Trade Cas. ¶ 67,689 at 58,542; *Coca-Cola Bottling Co. of New York*, 93 F.T.C. 110, 202 (1979).

F. Efficiencies

Since I have found that the challenged acquisition will not adversely affect competition, I need not resolve the parties' disagreement over possible efficiencies of the acquisition; nevertheless, some comment on this issue should be made.

There is no question that there were significant acquisition costs and that there will be significant consolidation costs, but, in the long run, the savings realized by operating a single facility in Ukiah will outweigh those costs (F 171-72).

Furthermore, the creation of a hospital which is larger and more efficient than UGH and UAH will provide better medical care than those hospitals could. *See Hospital Characteristics and Quality of Care*, J.A.M.A., Vol. 268, No. 13, p. 1709 (Oct. 7, 1992), reporting a study which concluded:

> Quality varies from state to state, but teaching, larger, and more urban hospitals have better quality in general than nonteaching, small, and rural hospitals.

Complaint counsel's analysis of this acquisition assumes that competition among health care providers will give consumers the same benefits as competition in other industries, *see Fishman v. Estate of Wirtz*, 807 F.2d 520, 537 (7th Cir. 1986), and they argue that competition between UAH and UGH before the acquisition was beneficial and that divestiture will reinstate those benefits to consumers residing in the Ukiah area.

The facts belie this claim. Competition did exist between those hospitals (F 122-27), but it appears to have increased the cost of hospital care in the Ukiah area through duplication of services (F 22). This is not surprising, for Dr. Melnick's 1988 analysis of hospital costs concluded that previous studies found that greater hospital competition led to higher costs. Dr. Melnick is optimistic that California programs now in place will contain costs (F 118), but at the present time one hospital markets in California have lower costs than two hospitals markets (F 119).

Thus, I agree with respondents that -- assuming the acquisition is illegal -- the traditional remedy of divestiture would probably saddle Ukiah with two inefficient hospitals (F 9-22) in place of one which, despite the costs of acquisition, will, in the long run, provide better health care to Ukiah residents (F 156-59).

G. Summary

1. The Commission has § 7 jurisdiction over respondents.
2. The acts and practices of respondents occurred in, and affected, interstate commerce.
3. The relevant product market is acute care inpatient hospital services.

4. The relevant geographic market encompasses the Ukiah-Willits-Lakeport-Santa Rosa area.
5. The challenged acquisition has not conferred market power on respondents and it is not likely to substantially lessen competition in the relevant geographic market.

ORDER

IT IS ORDERED that the complaint be, and it hereby is, dismissed.

/s/
Lewis F. Parker
Administrative Law Judge

Dated: December 9, 1992

APPENDIX J

ORDER OF THE FEDERAL TRADE COMMISSION
APRIL 16, 1993

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

JANET D. STEIGER, CHAIRMAN
MARY L. AZCUENAGA
DEBORAH K. OWEN
ROSCOE B. STAREK, III
DENNIS A. YAO

In the Matter of	)
	)
ADVENTIST HEALTH SYSTEM/WEST,	)
a corporation, and	)Docket No. 9234
	)
UKIAH ADVENTIST HOSPITAL,	)
a corporation.	)

ORDER

On April 13, 1993, Respondents filed a "Motion to Postpone Argument Pending Possible Filing of Petition for Writ of Certiorari." Respondents request (1) that the Commission postpone oral argument in this appeal until after June 23, 1993; (2) that if respondents file a petition for writ of certiorari by June 23, 1993, then the Commission further postpone oral argument until the Supreme Court rules on the petition for certiorari; and (3) that the Commission rule on this motion by April 16, 1993.

Respondents assert that they seek the postponement until June 23, 1993, to accommodate "Ukiah['s] wishes to have the full 90-day period to consider whether" to seek certiorari. Respondents also assert that if the Commission goes forward, "it may deprive the Supreme Court of the opportunity to meaningfully review the questions raised by the opinion of the Court of Appeals."

Respondents have cited no authority to support the position that hearing oral argument will prejudice whatever rights they may have to petition for certiorari. Accordingly, the motion to postpone oral argument is denied.

It is so ordered.

By the Commission.

/s/
Donald S. Clark
Secretary

ISSUED: April 16, 1993

FILED
AUG 2 1993
OFFICE OF THE CLERK

No. 92-2006

In the Supreme Court of the United States

OCTOBER TERM, 1993

UKIAH ADVENTIST HOSPITAL, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES M. SPEARS
General counsel
JAY C. SHAFFER
Deputy General Counsel
ERNEST J. ISENSTADT
Assistant General Counsel
FREDERICK E. DOOLEY
Attorney
Federal Trade Commission
Washington, D.C. 20580

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QUESTIONS PRESENTED

1. Whether the court of appeals properly declined to issue a writ of mandamus requiring the district court to rescind an order transferring this action pursuant to 28 U.S.C. 1631.

2. Whether the district court's order was immediately appealable under 28 U.S.C. 1292(a)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2006

UKIAH ADVENTIST HOSPITAL, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a15) is reported at 981 F.2d 543. The opinion of the district court (Pet. App. c1-c2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1992. A petition for rehearing was denied on March 23, 1993. Pet. App. B. The petition for a writ of certiorari was filed on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Adventist Health System/West (AHS) is a non-profit corporation that controls 18 hospitals in 5 States. AHS's combined patient revenues exceeded $600 million in 1990. Petitioner Ukiah Adventist Hospital (Ukiah Adventist) is a subsidiary of AHS. Ukiah Adventist is now doing business as Ukiah Valley Medical Center. In August 1988, petitioners acquired substantially all the assets of Ukiah General Hospital. Pet. App. a3, *id.* at i3-i4.

In November 1989, the Federal Trade Commission issued an administrative complaint alleging that petitioners' acquisition violated Section 7 of the Clayton Act, 15 U.S.C. 18. Pet. App. a3; *id.* at i1. In 1990, the administrative law judge issued an order and initial decision concluding that an asset acquisition by a non-profit corporation is not covered by Section 7 and dismissing the administrative proceeding. Pet. App. d1-d9, *id.* at e1-e12.

In August 1991, the Commission issued an opinion and order reversing the ALJ's initial decision and remanding for further proceedings. Pet. App. f1-f41. The Commission concluded that Section 7 of the Clayton Act applies to asset acquisitions by non-profit entities, and remanded to the ALJ to consider whether the challenged transaction violated Section 7. Pet. App. f6, f41.

2. After the FTC issued its complaint, petitioners filed an action in the United States District Court for the Northern District of California seeking to terminate the administrative proceeding on the ground that asset acquisitions by non-profit entities are not covered by Section 7. The district court dismissed the action for lack of jurisdiction, Pet. App. g1-g5, and the court of appeals affirmed, *id.* at h1-h10. Relying on this Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980),

the Ninth Circuit concluded that "[t]he general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship.'" Pet. App. h5.

3. After the Commission issued its interlocutory order, petitioners filed this action in the United States District Court for the District of Columbia. Petitioners again sought to enjoin the administrative proceeding on the ground that their asset acquisition is not covered by Section 7 of the Clayton Act.

The district court granted the FTC's motion to transfer the case to the Ninth Circuit pursuant to 28 U.S.C. 1631.[1] The district court explained that review of the Commission's final decision is vested exclusively in the courts of appeals under 15 U.S.C. 21(c) and (d), and that any order issued by the district court would be likely to affect the Ninth Circuit's future jurisdiction.[2] Accordingly, the district court held that it lacked jurisdiction under *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984) (*TRAC*). The district court stated that "[b]ecause the Court finds that

---

[1] Section 1631 provides, in part:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed[.]

[2] Under 15 U.S.C. 21(c), the Commission's cease and desist orders are subject to review "in the court of appeals * * * for any circuit within which [the] violation occurred or within which [the] person [subject to the order] resides or carries on business." Petitioners have not disputed that any cease and desist order that the Commission may enter in this case will be subject to review only in the Ninth Circuit.

it lacks jurisdiction, it does not reach the merits of plaintiffs' motion" for a preliminary injunction. Pet. App. c1.

4. The court of appeals affirmed. Pet. App. a1-a15. It first held that the district court's order transferring the case to the Ninth Circuit was not appealable. *Id.* at a4-a8. The court noted that "it is well settled" that transfer orders are not final orders and are not immediately appealable under the collateral order doctrine. *Id.* at a4-a5 (collecting authorities). The court adopted "the common sense view that section 1631 orders are interlocutory for the same reason that venue transfers are: the very purpose of transfer provisions is to allow the case to continue, rather than terminating it." *Id.* at a5-a6.

The court rejected three suggested bases for appellate review of the transfer order. First, the court concluded that the order was not reviewable under 28 U.S.C. 1291 because the district court did not dismiss the action for lack of subject matter jurisdiction. The court explained that "[a] transfer order keeps the case alive; an order dismissing the case brings the action to an end." Pet. App. a6. Second, the court of appeals concluded that its decision in *Goble* v. *Marsh*, 684 F.2d 12 (D.C. Cir. 1982), was inapplicable because, unlike in *Goble*, it is clear that the transferor court and the transferee court do not have concurrent jurisdiction to grant petitioners' request for injunctive relief. Pet. App. a6-a7. Third, the court of appeals rejected petitioners' contention that the district court's order denied a preliminary injunction, and therefore is appealable under 28 U.S.C. 1292(a)(1). The court of appeals found that the district court had transferred the action without reaching the merits of petitioners' motion for a preliminary injunction. And it noted that the transfer order is "wholly unrelated" to the merits of petitioners' claim for injunctive relief. Pet. App. a7-a8.

The court of appeals proceeded to consider petitioners' appeal as a petition for a writ of mandamus. Pet. App. a8-a15. The court held that the district court had "not even remotely approached committing the sort of abuse of its authority that would warrant granting a petition for mandamus." *Id.* at a10. The court of appeals concluded that the district court lacked subject matter jurisdiction. The court of appeals' decision in *TRAC* held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." *Ibid.*, quoting 750 F.2d at 75. In this case, the court of appeals explained, it is undisputed that review of FTC cease and desist orders is committed to the courts of appeals under 15 U.S.C. 21(c) and (d). In addition, the district court's disposition might affect the court of appeals' future jurisdiction. If the district court were to enjoin the FTC proceeding, the court of appeals' statutory obligation to review the FTC's order on the merits might be defeated. Pet. App. a11.

The court of appeals rejected petitioners' argument that district courts had jurisdiction to decide "purely legal" challenges to agency jurisdiction, stating that allowing such an exception "would invite an endless stream of suits filed in district courts, followed by appeals to this court, by parties seeking to stall or foreclose agency action." Pet. App. a13-a14. The court of appeals emphasized that denial of judicial review in the district court did not foreclose all judicial review, because petitioners are entitled to judicial review of any final cease and desist order that the Commission might issue. *Id.* at a12.

The court of appeals also concluded that the transfer was in the interest of justice, and that the action could have been brought in the Ninth Circuit at the time it was

filed in the wrong forum. Pet. App. a14-a15, citing *Clark* v. *Busey*, 959 F.2d 808, 811-812 (9th Cir. 1992); *Public Utility Commissioner* v. *BPA*, 767 F.2d 622, 626 (9th Cir. 1985).

5. While petitioners' appeal was pending before the District of Columbia Circuit, discovery and evidentiary proceedings were completed in the administrative proceeding. Pet. App. i2-i3. In December 1992, the ALJ issued an initial decision concluding that the transaction was unlikely to cause unlawful anticompetitive effects and therefore did not violate Section 7 of the Clayton Act. Pet. App. i53-i54. The FTC staff filed an appeal, and the Commission heard oral argument on April 22, 1993. It has not yet issued a final decision.[3]

ARGUMENT

1. The court of appeals' interlocutory decision does not warrant review. The Ninth Circuit now has physical possession of the record in this case, and petitioners are litigating the merits of their motion for a preliminary injunction in that court. In addition, the Ninth Circuit may review the transfer and, if it finds the transfer to have been "clear error," decline to accept it. *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817-819 (1988). If the Ninth Circuit rules against petitioners, petitioners may then seek review in this Court.

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[3] If the Commission finds a violation of law, it may enter an order to divest and for other appropriate relief. 15 U.S.C. 21(b). The Commission's order is subject to review in the court of appeals, 15 U.S.C. 21(c). After the record is filed, "[the] jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the Commission * * * shall be exclusive." 15 U.S.C. 21(d). The Commission's order does not take effect until judicial review is complete. 15 U.S.C. 21(g).

See *id.* at 817 ("[a] petition for writ of certiorari can expose the entire case to review").[4]

Moreover, the Ninth Circuit may well conclude that the Commission's order is not yet subject to review in *any* court. As the Ninth Circuit explained in rejecting petitioners' previous effort to short-circuit the administrative process, "[t]he general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship.'" Pet. App. h5. See *FTC* v. *Standard Oil Co.*, 449 U.S. at 238-239. The FTC's interlocutory order does not meet those criteria, and therefore is not subject to immediate judicial review.

2. a. Even if this case were a suitable vehicle for considering the court of appeals' application of its *TRAC* decision, that issue would not warrant review by this Court. Petitioners mischaracterize *TRAC* as a sweeping ouster of the district court's jurisdiction to enjoin unauthorized agency actions in virtually all circumstances. In fact, the decade-old *TRAC* decision is much more limited. *TRAC* rests on the settled principle that the courts of appeals have jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to protect their prospective jurisdiction over agency proceedings not yet before them. *TRAC*, 750 F.2d at 75-76, citing *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603-604 (1966). In *TRAC*, the court of appeals concluded that the existence of this prospective appellate jurisdiction over intermediate agency actions precluded collateral attacks on those actions in courts with no statutory review function. *TRAC*, 750 F.2d at 77. The court emphasized, however, that the scope of exclusive appellate review is limited to

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[4] Petitioners are in no position to complain about the completion of the transfer to the Ninth Circuit, because they failed to seek a stay of the District of Columbia Circuit's mandate.

"suit[s] seeking relief that might affect the Circuit Court's future jurisdiction." *Id.* at 78. Thus, *TRAC* applies only to attempts to seek interlocutory judicial review of interim agency action (or inaction) in ongoing proceedings where the relief sought threatens to defeat the appellate court's statutory obligation to review the final agency action. *TRAC* is thus consistent with this Court's recognition that ancillary or preliminary issues generally should be reviewed in the same forum that is charged with review of the final order resolving the core issue in a proceeding. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 742-743 (1985); *Foti* v. *INS*, 375 U.S. 217, 227, 232 (1963).[5]

b. Petitioners do not dispute that the District of Columbia Circuit's *TRAC* decision has been followed by other courts of appeals. See *Clark* v. *Busey*, 959 F.2d 808, 811-812 (9th Cir. 1992) (following *TRAC*'s companion case, *Air Line Pilots Ass'n, International* v. *CAB*, 750 F.2d 81 (D.C. Cir. 1984)); *Environmental Defense Fund* v. *NRC*, 902 F.2d 785, 786-787 (10th Cir. 1990); *Bywater Neighborhood Ass'n* v. *Tricarico*, 879 F.2d 165, 169 (5th Cir. 1989); see also *Green* v. *Brantley*, 981 F.2d 514, 521 (11th Cir. 1993). Contrary to petitioners' contention (Pet. 12), there is no conflict between the decision in this case and the Second Circuit's pre-*TRAC* decision in *PepsiCo, Inc.* v. *FTC*, 472 F.2d 179 (1972), cert. denied, 414 U.S. 876 (1973). In *PepsiCo*, the FTC denied a motion to dismiss an administrative complaint for failure to join additional parties. The Second Circuit concluded that the order was not made reviewable by the FTC Act be-

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[5] Subsequent decisions applying *TRAC* illustrate the limited scope of that decision. See *Cutler* v. *Hayes*, 818 F.2d 879, 887 n.61 (D.C. Cir. 1987) (*TRAC* does not apply where no statute commits review of agency decision to the court of appeals); *In re Checkosky*, 142 F.R.D. 4 (D.D.C. 1992) (*TRAC* inapplicable to a petition to perpetuate testimony under Fed. R. Civ. P. 27).

cause it did not require PepsiCo "to cease and desist from anything." 472 F.2d at 185. The court proceeded to consider the possibility that the order was subject to review by a district court under the Administrative Procedure Act as a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. The court discussed several reasons why such an order might not be reviewable under Section 704. See 472 F.2d at 185-186. Rather than resolving this question, however, the court accepted "for the sake of argument" the principle that Section 704 applies "if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order." 472 F.2d at 187. The court then concluded that PepsiCo fell outside that "possibly over-generous principle." *Ibid.* The Second Circuit's decision in *PepsiCo* plainly did not resolve the jurisdictional issue that it posed. Moreover, the court did not consider the possibility that the court of appeals had jurisdiction under the All Writs Act (and that therefore PepsiCo had an adequate remedy in another court).

c. Petitioners' suggestion that the court of appeals' decision conflicts with decisions of this Court is similarly unpersuasive. There is no conflict between the court of appeals' decision and *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). *McNary* was a challenge to an alleged "pattern or practice" of constitutional violations by the Immigration and Naturalization Service in its administration of the Special Agricultural Workers program (SAW). In holding that the district court had federal question jurisdiction to hear the case, the Court emphasized that individual SAW determinations were not subject to any judicial review unless the INS initiated a deportation proceeding against an unsuccessful applicant. *Id.* at 486. In addition, the plaintiffs in *McNary* did not seek to supersede the agency as the

initial decisionmaker in any specific proceeding. *Id.* at 494-495. And the Court recognized that the record in an individual deportation proceeding would not be adequate to permit review of the plaintiffs' constitutional claims. *Id.* at 496-497. In this case, in contrast, petitioners have a statutory right to judicial review of the Commission's final decision. Petitioners nevertheless seek to short-circuit the agency proceeding by litigating an issue that is integral to determining whether the challenged transaction is lawful and that does not require development of extraneous facts.[6]

This case is also quite different from *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988). One of the petitioners in *K Mart* argued that the case was governed by a statutory provision that conferred on the Court of International Trade exclusive jurisdiction to decide "any civil action commenced to contest the denial of a protest." *Id.* at 190, quoting 28 U.S.C. 1581(a). The petitioner conceded that it had not brought a "protest," but argued that the Court of International Trade had jurisdiction "as a corollary to protest jurisdiction." 485 U.S. 190. The Court held that Section 1581 did not apply to an action that "involves no 'protest,' much less a denial of one." *Id.* at 190-191. In this case, in contrast to *K Mart*, petitioners seek review of an interim order in a proceeding that is plainly subject to the exclusive jurisdiction of the courts of appeals. Moreover, it is clear that the interim order will be subject to plenary review by the court of appeals if the Commission enters a cease and desist order. *K Mart* is therefore inapposite.

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[6] The *McNary* opinion also emphasized that the relevant statutory provision limited judicial review to whether the agency had abused its discretion, a standard that was not appropriate for reviewing the plaintiffs' constitutional claims. 498 U.S. at 493. In this case, the FTC's legal determination on the Clayton Act issue will be subject to de novo review.

Contrary to petitioners' contention (Pet. 11), the court of appeals' decision does not conflict with *Leedom* v. *Kyne*, 358 U.S. 184 (1958). The Court has recognized that the "*Kyne* exception [to statutory judicial review provisions] is a narrow one." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). *Kyne* applies only where the aggrieved plaintiff has no other means of obtaining judicial review. See *Federal Reserve Board* v. *MCorp*, 112 S. Ct. 459, 465-466 (1991). By definition, *TRAC* applies only where a statute authorizes review by a court of appeals. Consequently, the two doctrines are mutually exclusive. See Pet. App. a12.[7]

3. Petitioners also ask this Court to grant review to decide whether Section 7 of the Clayton Act covers asset acquisitions by non-profit entities. Pet. 23-26. Neither the court of appeals nor the district court decided that question. There is no reason for the Court to depart from its usual practice of declining to consider issues that have not yet been addressed by the courts below, particularly in the context of an administrative proceeding that is still pending before the agency. Indeed, the issue will become moot if the FTC affirms the ALJ's dismissal order. See *Standard Oil*, 449 U.S. at 244 n.11 ("possibility that [party's] challenge may be mooted in adjudication warrants the requirement that [party] pursue adjudication, not shortcut it"). In any event, the only courts of appeals that have addressed the issue have concluded that Section 7 covers asset acquisitions by not-for-profit corporations. *FTC* v. *University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States* v. *Rockford*

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[7] The court of appeals' *TRAC* decision expressly recognized that *Kyne* might apply to "cases in which the underlying claim is not subject to the jurisdiction of the Court of Appeals." 750 F.2d at 78.

Memorial Corp., 898 F.2d 1278, 1280-1281 (7th Cir.) (dicta), cert. denied, 498 U.S. 920 (1990).

4. Finally, petitioners incorrectly contend (Pet. 26-27) that the district court's order denied their motion for a preliminary injunction, and therefore was immediately appealable under 28 U.S.C. 1292(a)(1). The district court clearly stated that it was not deciding the motion for a preliminary injunction:

> Before the Court are plaintiffs' motion for a preliminary injunction and defendant's motion to transfer the case or, in the alternative, to dismiss. Because the Court finds that it lacks jurisdiction, it does not reach the merits of plaintiffs' motion.

Pet. App. c1. As the court of appeals observed, the district court's order "reflects nothing more than the identification of the proper court, under *TRAC*, to decide the claim for injunctive relief." Pet. App. a8.[8] Moreover, the district court's refusal to reach the merits of petitioners' motion was plainly correct. Section 1631 "confers on [the court] authority to make a single decision upon concluding that it lacks jurisdiction—whether to dismiss the case or, 'in the interest of justice,' to transfer it to a court of appeals that has jurisdiction." *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. at 818. Accordingly, further review is not warranted.

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[8] Petitioners' suggestion (Pet. 27 n.21) that the transfer order had the practical effect of denying an injunction is incorrect. As the court of appeals noted, the purpose of a transfer order is to keep the case alive. Pet. App. a5-a6. Following the transfer order, petitioners were free to seek immediate relief from the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAMES M. SPEARS
General counsel

JAY C. SHAFFER
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

FREDERICK E. DOOLEY
Attorney
Federal Trade Commission

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